Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHRISTOPHER JOHN CAMPBELL, PETITIONER

V.

PEOPLE OF THE CITY OF PLYMOUTH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTION PRESENTED

Whether field sobriety tests conducted by the police in a traffic stop are a warrantless "search" within the context of the 4th Amendment to the United States Constitution?

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No.

CHRISTOPHER JOHN CAMPBELL, PETITIONER

v.

PEOPLE OF THE CITY OF PLYMOUTH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

CHRISTOPHER JOHN CAMPBELL, by and thru his attorneys, petitions for a writ of certiorari to review the order of the Michigan Supreme Court.

OPINIONS BELOW

The order of the Michigan Supreme Court (App., *infra*, 1a) is unreported. The order of the Michigan Court of Appeals (App., *infra*, 2a) is unreported. The Opinion and Order of the Wayne County Circuit Court (App., *infra*, 3a - 4a) is unreported. And, the Decision of the 35th District Court (App. *infra*, 5a) is likewise unreported.

JURISDICTION

The order of the Michigan Supreme Court was entered on February 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTE AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution, which provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

1. On September 15, 1996, at 3:35 a.m., a Plymouth City police officer effected a traffic stop upon the Defendant in Plymouth Township, Michigan. The officer was traveling westerly on a paved, dark, and winding/hilly road thru Hines Park when, from behind he allegedly observed Defendant in his mirrors close-the-gap between them and cross the centerline repeatedly. The officer allowed Defendant to pass and thereupon effected the stop. (App., *infra*, 11a - 14a, 16a, 28a - 29a).

. Field sobriety tests were conducted by the officer upon Defendant for alphabet, numbers, one-leg balance test, and preliminary breath test. The officer thereupon arrested Defendant for drunk driving (Operating While Under the Influence of Intoxicating Liquor, MCL 257.625/MSA 9.2325) and transported him to the station for further processing. (App., *infra*, 39a - 44a).

On December 11, 1996, an Evidentiary Hearing was conducted at the trial court level on the legality of the arrest. The evidence presented by both sides was diametrically opposed.

The police officer claims that he observed the Defendant for twelve (12) minutes over a distance that was later established to be 1.9 to 2.0 miles. He was traveling between 35 to 40 miles per hour in a 40 mile per hour zone. The police officer was mobile the entire time except to allow the Defendant to pass. (App., *infra*, 27a, 107a - 109a). However, a re-creation of the course traveled revealed that it would have taken only three and one-half (3 ½) minutes. (App, *infra*, 107a - 109a). Moreover, Defendant presented detailed evidence of the physical characteristics of the road and lighting conditions which discounted entirely the observations claimed by the police officer while Defendant was mobile. (App., *infra*, *60a - 110a*).

As to the field sobriety tests; Defendant testified that he passed the alphabet test but did not pass the one-leg stand because he was barefooted on a gravel shoulder. Further, it was established that the one-leg stand was administered contrary to the National Highway Traffic and Safety Administration Manual on DWI Detection and Standardized Field Sobriety Testing (which allows a suspect to drop his/her leg twice before

determining whether it is any indicator). The preliminary breath test was disputed by Defendant in that the officer did not testify that he was certified to administer such a test, and that it was proven that the officer failed to observe Defendant for the requisite fifteen minutes prior to the administration of such test.[1] Department of State (of Michigan) Police Special Operations Division, Tests for Breath Alcohol, Administrative Rule 325.2656(2)(b). (App., *infra*,19a - 20a, 50a, 113a - 123a).

At the conclusion of the hearing, the trial court ruled that the burden of proof was upon the Defendant: "I have to look at it (the facts presented) in a light most favorable to the prosecution, at this point" (App., *infra*,137a). The Court did not afford the benefit to Defendant of considering the traffic stop/field sobriety tests/arrest as a warrantless search and seizure entitling Defendant to the benefit of compelling the People (and not Defendant) to carry the burden of proof to establish its legality.

It is Defendant's contention that the burden of proof for the evidentiary hearing was upon the People for a warrantless search and seizure of the Defendant from the traffic stop, field sobriety tests, and ultimate arrest. This Fourth Amendment issue was argued and preserved in the State Courts: Trial Court (Petitioner's Motion to Dismiss for Failure to Establish the Requisite Reasonable Cause to Effect a Traffic Stop and Otherwise - Paragraphs 4 and 7), Circuit Court (Petitioner's Brief on Appeal pp 6-13) in Application for Leave to Appeal,

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[1]The officer's total contact time with Defendant from traffic stop to station transport was less than fifteen (15) minutes. (App., *infra*,_19a - 20a).

Court of Appeals (Petitioner's Application for leave to Appeal, pp 6 - 14), and Supreme Court (Petitioner's Application for Leave to Appeal, pp 7 - 16).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with the decisions of other state courts of last resort and or the decision below has decided an important question of federal law that has not been, but should be, settled by this court. The direct issue of whether the administration of field sobriety tests during a traffic stop is considered a "search" under the constitutional ambits of search and seizure within the Fourth Amendment to the United States Constitution has been decided by state courts of last resort in conflict with each other. *State of Montana v Purdie*, 209 Mont 352, 680 P2d 576 (1984) [Field sobriety tests are not a "search"]; *People of the State of Colorado v. Carlson*, 677 P2d 310 (1984) [Field Sobriety tests are a "search"] and *Commonwealth v Blais*, 428 Mass. 294 (1998) [Requiring a person to perform (roadside sobriety) tests constitutes a search or seizure]. And, *State of Oregon v. Nagel*, 320 Or 24, 880 P2d 451 (1994) [Field sobriety tests are a "search"], and in the present case, the trial court did not afford Petitioner the benefit of the People carrying the constitutional burden of proof to establish the propriety of field sobriety tests, including the initial stop, thereby unfairly shifting such burden upon Petitioner and treating the tests as <u>not</u> coming within the ambit and protections of the Fourth Amendment. The implications of determining that field sobriety tests are a "search" for the purpose of the Forth Amendment would directly resolve the conflicts between the courts on the identical and important question of federal law, and it would settle who would carry the

burden of proof in establishing the legality of the traffic stop/field sobriety test/arrest at an evidentiary hearing challenging same.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. A distinction exists between a "search" and a "seizure". *County of Sacremento v. Lewis*, 523 U.S., 140 L Ed 2d 1043, 118 S. Ct. ____(No. 96-1337)(1998). The temporary detention of a motorist by a police officer, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" with in the meaning of the Fourth Amendment. See *Delaware v. Prouse*, 440 US 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 US 543, 556 *United States v Brignoni-Ponce*, 422 US 873, 878 (1975). Thus, an automobile stop is subject to the constitutional scrutiny of 'reasonableness'.

However, whether field sobriety tests are a "seizure" subject to the Fourth Amendment scrutiny of 'reasonableness' is unresolved among the states and this Court. The recent decisions of this Court have addressed citizens rights in the context of a traffic stop in many facets: *Ohio v. Robinette*, 117 S Ct. 417 (1996) [The Fourth Amendment does not require that a lawfully seized detainee be advised that he is "free to go" before his consent to a search will be recognized as voluntary.], *Wyoming v. Houghton*, _____ U.S. _____, ____ L.Ed.2d_____, ___S. Ct._____, (No. 98-184)(Decided April 5, 1999). [It is not a violation of the Fourth Amendment when police officers search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband]; *Knowles v. Iowa*, 525 US _____, 142

L Ed. 2d 492, 119 S. Ct. ____ (No. 97-7597) (1998). [Issuing a speeding ticket, without an arrest, does not authorize a police officer to conduct a full search of a car which is consistent with the Fourth Amendment], and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). [A police officer may request a motorist in a valid traffic stop to step out of the car for a safety pat down, such intrusion being only incremental.]

No right is held more sacred than the right of any individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestionable authority of law. *Terry v Ohio*, 392 U.S. 1 (1968). There is no ready test for determining reasonableness of a search or seizure other than by balancing the need to search against the invasion of which the search or seizure entails. *Terry, supra.*

The Exclusionary Rule mandates that all evidence obtained by searches and seizures in violation of the Federal constitution is inadmissible in state courts. *Mapp v Ohio*,367 U.S 643(1961), rehearing denied 268 U.S. 871. This rule was adopted to deter police from violations of constitutional and statutory protections, and was consonant with the earlier decisions of Michigan's courts; the illegally obtained evidence may not be used directly or indirectly to convict. *People v. Taylor,* 341 Mich 570 (1955); *People vs. LaGrange*, 40 Mich App 342 (1972). It is broadly applied and is also applicable to information, tangible or not, obtained through an illegal search. *Wong Sun v United States, 371 U.S. 471 (1963).* Indeed, Michigan itself normally continues to maintain a strong vigil on behalf of its citizens' constitutional right to be free from unreasonable searches and seizures, and has declined to allow a good faith exception to the Exclusionary Rule. *People v Sunding,* 153 Mich App 227 (1986), leave denied [declining to

follow *US V Leon*, 468 US 897 (1984)].

A ruling from this court determining that field sobriety tests are a search afforded the protections against unreasonableness mandated by the Fourth Amendment to the United States Constitution would necessarily require the State to carry the burden of proof to establish its legality at a suppression hearing. *Coolidge v New Hampshire*, 403 US 443, (1971). It has previously been held that a preponderance of the evidence is a constituionally sufficient standard to be met at an evidentiary hearing. *Lego vs. Twomey*, 404 US 477 (1972).

It would follow that the burden is on those who seek exemption from the constituional mandate to show "that the exigencies of the situation made the warrantless search imperative." *People v. Mason*, 22 Mich App 595, 617 (1970), citing *MacDonald v United States*, 335 US 451(1948).

No warrant was issued against Petitioner for any aspect of the underlying offense. The Trial Court imposed the burden of proof upon Petitioner as to all aspects of the hearing, from the initial stop thru the field sobriety tests and the ultimate arrest: "I have to look at it (the facts presented) in a light most favorable to the prosection, at this point " (App., *infra*, 137a). This was an unconstitutional shifting of the burden of proof upon Petitioner and created an unreasonable presumption that Petitioner would have to overcome.

At a suppression evidentiary hearing, if the evidence is evenly balanced and the burden of proof is upon the People; a citizen's motion to dismiss and or suppress must be granted. Indeed, it has been previously held that an odor of intoxicants, bloodshot eyes, admission of drinking alcohol, failure of a

Nystagmus test, and inability to produce documentation was not sufficient probable cause to administer field sobriety tests. *People v Stroup*, 147 Or App 118 (1997).

Given the pervasiveness of zealous enforcement of drunk driving laws throughout each and every state of this Country, as well as the District of Columbia; and given that field sobriety tests are almost universally applied in each and every detention of a motorist for suspicion of drunk driving; it is paramount that the rights of the citizens of this country be universally defined for equal enforcement of the Fourth Amendment to the United States Constitution against warrantless and unreasonable searches and seizures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May, 1999

STATE OF MICHIGAN

35TH DISTRICT COURT

People,

Plaintiff,

vs.

CHRISTOPHER JOHN CAMPBELL,

Defendant.

Case No. 96-CD-052442
Hon. John MacDonald

_____/

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_____/

PT 10/9/96 M
MOTION 11/13/96 M
MOTION 12/11/96 M
MOTION HEARD AND DISMISSED BY COURT
12/18/96
J.E.M.

APPENDIX A

STATE OF MICHIGAN

WAYNE COUNTY CIRCUIT COURT

People,

Plaintiff,

vs.

Case No. 96-052442 PC
Hon. Kathleen MacDonald

District Court Case No. 96-CD 052442
Hon. John E. MacDonald

CHRISTOPHER JOHN CAMPBELL,

Defendant.

_____/

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ORDER AFFIRMING DECISION OF THE TRIAL COURT ON THE ISSUES RAISED BY DEFENDANT-APPELLANT'S APPEAL

APPENDIX B

At a session of said Court held at the
City-County Building, Detroit, MI
on: APRIL 30, 1997
PRESENT: HON. KATHLEEN MACDONALD
Circuit Court Judge

The parties having filed Briefs on Appeal; this matter having come on for oral argument; and the Court being otherwise fully advised in premises:

IT IS HEREBY ORDERED that the decision of the Trial Court on the issues raised by Defendant-Appellant's Appeal are affirmed for the reasons stated on the record.

Dated: April 29, 1997

KATHLEEN MACDONALD
CIRCUIT COURT JUDGE

Court of Appeals, State of Michigan

ORDER

People of Plymouth v Christopher J. Campbell

Docket No. 2085759

LC No. 96-052442 PC

Michael J. Kelly
Presiding Judge

Myron H. Wahls
Hilda R. Gage
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by
Carl L. Gromek, Chief Clerk on

June 18, 1998 CHIEF CLERK

APPENDIX C

ORDER

Entered: February 25, 1999

MI Supreme Court
Lansing, Michigan

112567

PEOPLE OF THE CITY OF PLYMOUTH,

Plaintiff-Appellee,

v.

CHRISTOPHER J. CAMPBELL,

Defendant-Appellant.

SC: 112567
COA: 208759
Wayne CC: 96-052442FC

On order of the Court, the application for leave to appeal from the June 18, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

February 25, 1999

CLERK

APPENDIX D

STATE OF MICHIGAN

DISTRICT COURT FOR THE 35TH JUDICIAL DISTRICT

PEOPLE,

vs. CASE NO. 98-CD 052442 PC

CHRISTOPHER J. CAMPBELL

Defendant.

EVIDENTIARY HEARING
BEFORE THE HON. JOHN E. MacDONALD, JUDGE

Plymouth, Michigan, December 11, 1996

APPEARANCES:

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Ctiy of Plymouth

ALEXANDER V. LYZOHUB
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Livonia, MI 48150

CAROL A. RICHARDSON, CER 3273

APPENDIX E

THE COURT: The Court will call thecase of People v. Christopher J. Campbell. People ready to proceed?

MR. MILLER:Cameron Miller, on behalf of the People, we are ready, your honor.

MR. LYZOHUB: For the record, your honor, Alex Lyzohub, appearing on behalf of he Defendant. We are ready to proceed.

THE COURT: Now, has he been arraigned, I think he has. I remember you were here before. You will waive the reading of the complaint?

MR. LYZOHUB: Yes, your honor.

THE COURT: We will enter a plea of not guilty. This is your motion..

MR. LYZOHUB: This is Defendant's Motion to Dismiss for failure of the People to establish the requisite/reasonable cause to effect a traffic stop and otherwise. It is my understanding at this point, we are postured for an Evidentiary Hearing. The Prosecutor has the burden of proof, and we are prepared to proceed as well.

I did discuss with Mr. Miller this morning, a sequestration order. I have no objection in fact, I encourage a sequestration order except to the that we have hired a private investigator to investigate the scene, take pictures, videos, trial runs of what the officer might have seen, and I believe that since the investigator is here in the capacity of certain facts that will come forth during the hearing; that it is

important that he be allowed to remain in the room to listen to the testimony of Officer Bianchi.

He was not there obviously, and he is just here for purposes of rendering testimony as to the ability to observe and things like that. I think, if anything, it would be helpful that he be allowed to stay in the room to listen to Officer Bianchi' testimony.

THE COURT: Well, do you have any objection to that?

MR. MILLER: Yes, your Honor. We would object simply because if an alleged expert is here to give testimony as to certain conditions along the roadway, or things of that nature, he can give those– that testimony for the roadway,-- which it is my understanding they have videos and photos.

We have indicated that we will stipulate to the entry of the photos, as they have been shown to us, that they are in fact, a true and accurate reproduction of the roadway, where the stop and the probable cause first arose.

But, as to exactly where it arose, I think it would be better if we got the independent testimony of the expert saying, what he feels the conditions for the roadway along the way are, rather than letting him say, "oh, yeah, at this point it is this."

THE COURT: Well, normally the objection is that the expert sits here and educates himself, and is able to correspond his testimony with that person that takes the stand.

MR. MILLER: Exactly.

THE COURT: So, if we are going to have sequestration, we will have it all the way around, okay.

MR. LYZOHUB: Well, if I could just respond, your Honor. My client's investigator is fixed testimony. I mean the–

THE COURT: Well, we don't know if it is fixed testimony. I have been around here long enough to know that sometimes,-- I am not saying he is going to do it, but they can shave their testimony to fit whatever needs to be fit.

We will eliminate all the witnesses.

MR. MILLER: If need be, it is Defendant's motion, I would be happy,-- if he wants to call this investigator first.

MR. LYZOHUB: I will not do that.

THE COURT: Okay, that re-affirms what I am doing then. What we are going to do, anybody that is going to be a witness, please step out in the hall.

Step out in the hall, keep yourself available. You can leave your things in here, if you want. You may proceed.

RONALD BIANCHI

Called by the People, at about 10:04 A.M., sworn by the court officer, testified:

DIRECT EXAMINATION

BY MR. MILLER:

Q For the record, could you please state your full name?

A Ronald Bianchi. B-I-A-N-C-H-I.

Q Where are you employed?

A City of Plymouth Police Department.

Q How long have you been employed in that capacity?

A With the City of Plymouth, over 7 ½ years.

Q Were you employed in that capacity on September 15, 1996?

A Yes, I was.

Q Do you see anybody in the courtroom today, that you saw on that date?

A Mr. Campbell, the Defendant.

MR. MILLER: For the record, he has indicated, Christopher Campbell, the Defendant in this matter.

MR. LYZOHUB: We will stipulate.

BY MR. MILLER:

Q What, if anything, drew your attention to Mr. Campbell on that date?

A At approximately 4:00 in the morning, I was traveling westbound on Hines Drive from Haggerty. As I approached Woods Drive, I noticed a set of headlights in my rearview mirror, getting closer and closer. My speed at the time was 35-40, and again the headlights closed the gap between the two of us, rather quickly.

Q When the headlights are closing the gap quickly as you characterized it, you were, in fact, outside the City of Plymouth, at that time; is that correct?

A Yes, sir, I was.

Q Did you observe the subject in the City of Plymouth after that time?

A Yes, sir, I did.

Q What, if anything, did you observe at that time?

A Like I said, what drew my attention was the time in which he closed the gap. As I continued westbound on Hines Drive, I could see through my mirror that the vehicle behind me was driving left of the center line. To clarify, he wasn't driving completely over the center line, but several times his vehicle would veer over the double yellow line.

Q You said you saw this in your mirror?

A Yes, sir.

Q Which mirror?

A Both the rearview mirror and the side view mirror.

Q Is that area a passing zone?

A Yes, sir.

Q That was in the non-passing–

MR. LYZOHUB: I am going to object that is not what the witness testified.

THE COURT: That is true, don't lead the witness.

MR. MILLER: Your Honor, I said I think, I don't mean to mis-characterize it.

THE COURT: We will find out what he thinks, okay, not you.

BY MR. MILLER:

Q How many times if any, would you estimate that the Defendant went left of center?

A 4 or 5 times.

Q All of those were in a no-passing zone?

A I can't be certain that they were all in the no-passing zone, but for the most part I think Hines Drive is posted no passing.

Q When you saw the Defendant go left of center, were you then located in the City of Plymouth?

A Yes, sir.

Q Was he, in fact, located within the City of Plymouth?

A Yes, sir, he was right behind me.

Q What, if anything, happened next?

A As we approached Wilcox, I pulled over to the right side of the road and allowed the vehicle to pass me. At Hines and Northville Road, I effected a traffic stop, on the vehicle that had passed me, having been in my rearview mirror prior to that.

Q What happened immediately after the vehicle passed you?

A He accelerated rather quickly. I remember having to– I pulled over just east of Wilcox, and it probably took me half way through the bend to catch up to the vehicle.

Q Then you said you pulled the vehicle over on Northville Road?

A Yes, sir.

Q Which again would have been outside the City of Plymouth?

A Yes, sir, I believe that is in the Township of Plymouth.

Q At the time that you saw him– the times that you saw him go left of center, in the no-passing zone; were in the City of Plymouth?

A Yes, sir.

MR. MILLER: No other questions of this witness, your Honor.

THE COURT: You may examine the witness, Mr. Lyzohub.

CROSS-EXAMINATION

BY MR. LYZOHUB:

(At about 10:10 A.M. DX1 marked by reporter)

Q Good morning, officer.

A Good morning.

Q Sir, you are trained to include all relevant facts in the documents created in a criminal matter, from the ticket through the report?

A Yes, sir.

Q You are trained to be accurate in the documents created in a criminal matter, from the ticket to the report?

A Yes, sir.

Q You are truthful and accurate in all the documents created in this matter by you, including the ticket through the report?

A Yes, sir.

Q You would never alter or falsify documents that you created relative to a criminal case?

A No.

Q Officer, do you recognize this document?

A It is my handwriting, and it appears to be the citation that was issued to Mr. Campbell.

Q I am going to hand you what has been marked as DX1, can you identify that for me, please.

A Yes, sir, this is the copy of the citation that would have been given to Mr. Campbell upon his release from our custody. I did write it.

Q Is that the identical document that has been blown up, that stands in front of you, sir?

A Well, the ticket numbers are the same. I didn't have

this copied, I have no idea if it was altered between the time that I wrote it, and the time that this was blown up. Like I said, the ticket numbers match, both have my signature, both have my handwriting.

Q Does your ticket say this, I would like you to refer to the exhibit, – "the undersigned says that on September 15th, 1996, at approximately 3:55 A.M.,"-- I am dropping down a little bit,-- "the person named above, in violation of local ordinance upon Hines Drive, at or near Wilcox, within the City of Plymouth, County of Wayne, "–and then talks about the violation, did the following. It talks about the violation; is that what the ticket says?

A Yes, sir.

Q You were subpoenaed to bring in dispatch records today, did you bring those with you, sir?

A No, sir, I don't know if the Prosecutor received those subpoenas or not.

MR. MILLER: Your honor, if I may, I believe the subpoena was issued to our office. I was under the impression that it has been completely satisfied-defense counsel is satisfied with the production of the subpoena. It is quite a thick package–.

MR. LYZOHUB: I just wanted to preclude any authenticity questions, your Honor. I have the document in question, but I don't want any authenticity questions, that's why I re-issued a subpoena to be produced,

for documents that we produce today. I would be more than happy to show the document to the Court, have it marked and admitted into evidence.

THE COURT: Yes, fine.

MR. MILLER: We may stipulate, I don't know what it is.

(At about 10:15 A.M. DX2 marked by reporter

THE COURT: If this is going to take a few minutes, I can take care of a few other people. I can wait, just go ahead.

MR. LYZOHUB: I believe this is to be stipulated for admission, by the Prosecutor.

MR. MILLER: So stipulated, assuming the proper foundation is laid.

THE COURT: Okay.

BY MR. LYZOHUB:

Q Officer, when you finish an arrest, is it true that you call into the station and indicate that you are enroute, back to the station?

A Yes, sir.

Q That is logged onto records that are kept within the department; is that correct?

A That is procedure, I don't know, sometimes it may not be done, but that is the procedure, yes.

Q I would like to hand you a sheet that talks about dispatch comments, and I believe it is relative to this case. Does the dispatch comments, and I believe it is relative to this case. Does the dispatch comment add that at 4:05 A.M. there was one in custody, OUIL, back to the station?

A No, this comment was added at 4:05.

Q Okay, so when you call it in, you are already on the way back?

A Uh, I don't call enroute until I am actually ready to put it into gear and go.

Q Okay, so it is probable that when you called it in, this was before 4:05?

A It could have been, again, I don't know if the computer clock time is the same as the clock that they give us at dispatch. There is an internal clock in the computer, which will automatically stamp that time. When they make that comment, they don't put in, comment added at 4:05, it is just put in.

Q They just put it in and the computer pursuant to it's automatic clock, prints it up and states that at 4:05 A.M., enroute to station, OUIL in custody?

A 4:05 computer time, again that may differ from the

dispatch clock. It may be ahead of it, it may be behind it.

Q To the best of your information and knowledge or belief, that 4:05 is an accurate time?

A It is an approximate time, yes, sir.

MR. LYZOHUB: I move for the admission of this dispatch comment into evidence, your Honor.

MR. MILLER: No objection.

THE COURT: Is that prepared by you?

THE WITNESS: No, sir, it is generated through dispatch.

MR. LYZOHUB: With all due respect, I did subpoena for it, so if we need the dispatcher–

THE COURT: No, no, no. I don't need the dispatcher. I just want to make clear that he didn't prepare that. It will be admitted.

(At about 10:15 A.M. DX2 admitted by court)

BY MR. LYZOHUB:

Q So, it is approximately a total of ten minutes from the point of seeing the Defendant at Wilcox and Hines Drive, which is what your certified ticket says,

because it is signed under penalty of perjury,–"I declare the penalties of perjury,–" and by 4:05 A.M. you were on your way back to the station, with the Defendant in custody; is that correct?

A If you are asking me in real time, from the time that I stipped him, until–

Q Well the ticket says that you observed him at Wilcox and Hines Drive?

A I believe 3:55 is the time that I called out on the stop. When I make a traffic stop, if I am following somebody if I am soing stationary radar, and I observe somebody speeding, say that happens at 12:00, exactly at 12:00 real time, it may take me a couple of minutes to catch up to a speeder.

Q Let me ask you this question, sir. Is it true that your ticket says that on September 15, 1996, at approximately 3:55 A.M., you observed the Defendant upon Hines Drive at or near Wilcox?

A Approximately 3:55, yes, sir, that is accurate.

Q And the dispatch is at 4:05, the dispatch records say you are enroute at 4:05; is that right?

A That is what dispatch says, yes.

Q Now, what were the lighting conditions on Hines Drive at 4:00 in the morning, on that particular day?

A It is not lit.

Q You probably drive that road a lot; don't you?

A Yes, sir.

Q I am going to ask if you could please go to the board and draw out Hines Drive for me, please.

A It is going to be a tough one.

THE COURT: There is a mike, take that mike and put it as close as you can to the board.

(OFFICER AT DRAWING BOARD)

BY MR. LYZOHUB:

Q Officer, if you need to change Hines Drive to be more accurate, feel free to do that. I want you to be as accurate as possible.

A Again, Hines Drive is a rather curvaceous road. Where– how far each curve is,-- this isn't going to be very accurate at all.

Q I am just giving you that opportunity, officer. Thank you. Incidentally, sir, when you said it was dark out there, is it true that you were unable to actually and physically observe my client personally, until such time that you effected the traffic stop and approached the vehicle and could see him face to face?

A That is correct.

Q You could recognize that – you didn't even know who he was before this?

A No, sir.

Q How much distance is there total between the point of Haggerty Hines Drive, and the point where you effected the traffic stop upon my client?

A Uh, I would have to guess a mile and a half, or so.

Q Maybe two miles?

MR. MILLER: I am going to object, your Honor, the officer testified that it was a guess at a mile and a half.

THE COURT: It is whatever he says it is, it doesn't make it so.

BY MR. LYZOHUB:

Q I want you to identify exactly at what point, you first observed my client, as you testified previously with the headlights, from behind?

A I know I was over the bridge here, I was probably here, and your client—

THE COURT: You can use

our fabulous magnetic cars there.

THE WITNESS: Thank you. I know that I was east of Woods Drive.

BY MR. LYZOHUB:

Q You were east of Woods Drive?

A Yes.

Q On this map, to the right of Woods Drive?

A Yes. And, your client was somewhere back here, he was between myself and the bridge.

Q Now, at that point you recognized that as Plymouth Township; is that right?

A Yes, I believe the City does not start until you– Woods Drive is all ours, so at some point here,--- I believe the City– there is another bridge up here, convalescent center is up here, so this is the City in here, and there is Haggerty Field in here, that is the Township. I believe the City runs something like this. (INDICATING) So, he was in the Township, when I first observed him.

Q Is it fair to say that my client was no closer than 60 yards, from the back of your vehicle?

A He was farther back than that.

Q Further back than 60 yards?

A Yes, sir.

Q How far back would you day he was?

A Uh, at one point like I said, I didn't observe him until I was somewhere around here. (INDICATING) I don't know if he came up Haggerty, I don't know if he came up Hines, I don't know if he was coming north on Haggerty. I don't know where he came from, but I just saw him in my rearview mirror. He was probably maybe a 1,000 feet or so, behind me.

Q Is it fair to say, that he never got closer than 60 yards to your vehicle?

A At any point?

Q Yes, sir.

A Uh, he got closer than that, yes.

Q How much closer.

A Uh, well, he passed me.

Q Okay, but up until the point that you passed Woods Drive he got no closer than 60 yards?

A Uh, that would be a fair estimate, yes.

Q Sir, I know on your drawing, I know it is not– I am

not asking you to be an artist, I know you said you were trying to be as accurate as you can, but I note that this section between the boundary line that you believe is the City through where you have drawn Woods Drive, do you have a straight a–way there? Is that a fair statement?

A That is what I have drawn. Again, I don't recall,-- I know it bows out at one point because there is a comfort station in here, where Riverside intersects with Hines Drive. There is a comfort station here. I know the road bows– I don't recall if it bows in or it bows out. It is not perfectly straight, no.

Q Okay, is it true that it is your testimony that you observed my client during this time between the ingress and egress of Woods Drive, if I could use those terms.

A Between here and here?

Q Yes.

A Yes, I was able to observe his vehicle.

Q And, it is your position or your claim or your belief, that part of that area between the ingress, which is the south part of Woods Drive, and the egress, which is the north part of Woods Drive, has a straight a-way for you to be able to see the Defendant?

A Again, I don't know if it is a straight a-way, if it is a minor curve,--

Q Either a straight a-way or a minor curve?

A Yeah, I would have been able to see him, yes, sir.

Q Now, you are saying that you observed him from your rearview mirror; is that right?

A His vehicle, yes.

Q I recall that you also testified, and correct me if I am wrong, that you observed him on your sideview mirror?

A Yes, sir.

Q And you are referring to, of course, to your driver's side view mirror?

A Yes.

Q And, I presume that you sat normally in your car, as you were proceeding through this maneuver of Haggerty Road, through the time that you stopped my client?

A Define normal?

Q You weren't reaching down, I mean, you were sitting there still, driving normally, as you were going down the road, and my client was behind you?

A Yes, sir.

Q And, you already testified that Hines Drive is quite curvey, so, I mean you have to keep attention on the road, I mean, you can't just keep looking in the rearview mirror, you have to be constantly be looking in front of you, to make sure you are not going to cause an accident, and to be a safe driver.

A What is your question?

Q that is the question. Is it true that you will have to constantly keep yur attention in front of you, as well?

A Yes.

Q So, your attention is divided, so to speak?

A Yes, sir.

Q Do you know how much time elapsed between the first time that you saw my client, to the time that you effected the traffic stop, if if you can guess, if you know, if you don't?

A Uh, from the time that I first saw him, the headlights, until the time I made visual contact with your client, twelve minutes or so.

Q How is the west of Hines Drive to the best of your recollection, past Woods Drive?

A PAUSE.

Q Is it curvey, straight?

A Uh, as you– I know when you are coming out of Woods Drive, the road does bend in towards you, so. Coming out of here, there is a sidewalk. You have to inch up to see. To the right, it is pretty straight, again this is way off. (INDICATING) It is pretty straight until I believe you get to Plymouth Road, Plymouth Road bridge. Then it is straight again, you got Gunsolly, Mill over here. That I believe, is straight for the most part. Then it curves, when you get to the road overpass, it vents to the left, until you get to Wilcox. Between Wilcox and Northville Road, it is a rather large bend.

Q The area between Wilcox Road and Northville Road, that is Plymouth Township; is that correct?

A Yes, it is.

Q Then the straight a-way that you are somewhat describing, on Gunsolly, that it Plymouth Township as well, to the best of your information, knowledge and belief?

A Uh, I am not sure. Again, Hines Drive cuts in and out of the City limits. I believe three out of four intersections of Wilcox is City. There is a house here. (INDICATING) I believe all four corners of the intersection are the City. There is a swimming pool or a pond in there, in the backyard of this house here. That is the Township. So, it runs somewhere up in here. Did I answer your question?

Q Thank you. Officer, you agree with me that Hines

Drive is not only a very curvey road, but that it also takes different elevations, noticeably?

A Uh, the park does, the road is- maybe there are different elevations, but I can't say that it would be more than– yes, you are right.

Q At what point, if you could put that on the map for me, did you allow my client to pass you?

A I pulled over right here (INDICATING), east of Wilcox Drive, and your client passed me here.

Q The record should reflect that you put your car, looks like immediately east of Wilcox and Hines Drive, How much distance can you tell us were you from the intersection of Wilcox and Hines Drive?

A I don't recall if I was on the shoulder, or if I waited until I got to the turn-in flare. I just know it was this side of Wilcox. (INDICATION)

Q Okay, when you say this side, you are referring to the east side?

A Yes, sir.

Q Thank you. And, is it true, sir, that when you operating your vehicle on that date, time and place, on Hines Drive, you had your running lights on?

A Headlights.

Q Headlights, well you had your tail lights on?

A Yes, sir.

Q I mean when you pull thee headlights on, your–

A Running lights to me refer– tells me there is no headlights on. I had both headlights and– headlights, tail lights and my running lights in the front were on.

Q So, you had all your lights on, the entire time that this happened that evening?

A Yes.

Q You didn't turn your lights off, when you pulled off to the side of the road, immediately east of Wilcox; did you?

A I don't recall.

MR. LYZOHUB: You may take the stand again.

BY MR. LYZOHUB:

Q Officer, is it true that you followed safe and proper police procedure, with this Defendant?

A Yes, sir.

Q I subpoenaed you to produce all relevant directives with the City of Plymouth Police Department, as to

your duties that evening, did you produce that?

A I was not served that subpoena. You may have served the City.

MR. LYZOHUB: Let me see if I can resove this.

(CONFERENCE OFF RECORD WITH PROSECUTOR)

BY MR. LYZOHUB:

Q I am going to read this along with you, officer.
(At about 10:35 A.M. DX3 marked by reporter)

MR. LYZOHUB: And, I move for it's admission, your Honor.

THE COURT: Any objection?

MR. MILLER: No objection, your Honor.

THE COURT: It will be admitted.

(At about 10:35 A.M. DX3 admitted by Court)

BY MR. LYZOHUB:

Q It says here, "patrolman, patrol division, vehicles. A patrolman shall note and investigate,"-- can you read that, sir?

A Yes.

Q "Especially during the nightime, all vehicles, drivers or occupants of which in any manner, may excite suspicion. He shall take such immediate action as he deems necessary and record the facts to his superior officer. He shall pay particular attention to motor vehicles of all kinds, observing their license numbers. He shall constantly watch for such as have been stolen, or which may have been used in the commission of a crime, those not properly licensed or legally equipped." Did you follow that with me, officer?

A Yes, I did.

Q Do you agree with that?

A Yes.

Q That is your procedure?

A Yes, sir.

Q But, is it true officer, when the Defendant drove upon you,-- when you first saw his headlights at a high rate of speed, didn't this excite suspicion at that time?

A It got my attention, yes.

Q Weren't you required to take immediate action, like the regulations state?

A Uh, our past practice, no. I mean, immediate can be anywhere between right now, to several minutes.

Q Obviously, you consider him a hazard, because you did pull him over ultimately; is that right?

A Yes, I did.

Q And, you didn't consider him a hazard as he was crossing over the center line, behind you on a curvey road, at night?

A Like I stated, he didn't cross completely over, he was driving left of the center line, four or five times. He crossed–

Q Regardless, and even though you observed him on Woods Drive, from behind, crossing over the center line, you testified I believe, four or five times, you did not effect the stop until a large distance of time thereafter, at about Northville Road and Hines Drive?

A Everything you said is true, yes.

Q And, this rule that I referred to, also puts an increased obligation on an officer at night; does it not?

A So it states.

Q And, do you agree with that?

A I don't have to agree with it, that is our policy.

Q That is your duty?

A Yes, sir.

Q You have already testified you follow duty; right?

A Yes, sir.

Q And, you should be concerned for your safety of any suspicious behavior, is that right?

A Not only my safety, but those of the City that I protect.

Q Do you recall what kind of car my client was driving?

A Mercedes or BMW.

Q You should be concerned for your safety because he was driving at night, speeding car, eratic behavior, is that right?

Mr. Miller: Your Honor, I guess I am going to object on relevancy. I am not sure where this is going.

THE COURT: I see no relevancy to this whatsoever. I mean, an officer makes a judgment decision on every situation. Every situation is different. I mean, you know. Does he immediately slam on his brakes and stop everybody that is weaving? Probably, not. He follows them and sees what the situation is. I don't see the relevancy of this line of questioning.

MR. LYZOHUB: I can tie it up in the next question.

BY MR. LYZOHUB:

Q Did you call for back-up that evening?

A I don't believe so.

Q You were in a fully marked patrol vehicle, is that correct, sir?

A If I can refer to the ticket. I can refer to my report, and tell you exactly what vehicle I was in. It is in the first page of the narrative.
Yes, I was in full uniform, fully marked patrol unit, number 54.

THE COURT: Somebody has to pick up on that.

MR. MILLER: We have already established where car 54 was.

(At about 10:40 A.M. DX4, DX5, and DX6 marked by reporter)

MR. MILLER: People would atipulate to the admission of DX4, DX5, and DX6 will be admitted.

THE COURT: Is there any dispute about that at all, in this case?

MR. LYZOHUB: No, there is no dispute, your Honor, but I think it is material to this case to show how the car looks, it's appearance, and–

THE COURT: Does it look any different than any other police car, outside of the colors that each different community has?

MR. LYZOHUB: It is white, more visible at night, and it is less likely that my client would have not seen the car at night. It makes the officer's story more improbable, that my client would have raced up to a police officer car at night, on a dark road. I think it is material–

THE COURT: I am not sure you can draw that conclusion. I have seen– I have heard people bump into police cars, and run into them, and so forth. I don't see the relevancy, I honesty don't, but I said I will admit the documents, you can proceed. Keep in mind this is an evidentiary hearing, not a trial, okay.

MR. LYZOHUB: I understand that, your Honor.

BY MR. LYZOHUB:

Q Is this the vehicle that you were in that evening?

A For certain this one is, this photo here shows the back end of a police car, it appears to be unit 54.

Q Well, that is the same plate number that is on this one, if you say it is 54?

A Oh, thank's for pointing that out to me. Yes, that is the vehicle that I was driving.

Q That is the same appearance of the vehicle, as on the night in question?

A The night in question, it may have been a little bit dirtier, but, yes, it is the same vehicle. It looked the exact same way as it did the night that I stopped Mr. Campbell..

MR. LYZOHUB: Could I confer with opposing counsel for a moment, your Honor?

THE COURT: Sure, if we have got a few minutes, because I can take care of a few people here.

MR. LYZOHUB: Yes, please, thank you, your Honor.

(At about 10:45 A.M. RECESS)
(At about 11:02 A.M. proceedings reconvene)

THE COURT: We are back on the record on People v. Christopher John Campbell. I guess both attorneys are out in the hall. We will take a quick recess for a few minutes.

(At about 11:02 A.M. RECESS)

(At about 11:06 A.M. proceedings reconvene)

THE COURT: We are back onthe record on People v. Christopher John Campbell. You can proceed.

MR. LYZOHUB: Your honor, there were two other major grounds for my motion.

THE COURT: Wait a minute, the police officer was on the stand, are we finished with him?

MR. LYZOHUB: I am not finished with him.

MR. MILLER: Your Honor, if I may, we have decided to try to take this matter in sections with the officer's testimony. I have presented the first portion of it, which was the probable cause for the stop in the first place. Now, it is my understanding, upon stipulation of counsel, I will proceed with the testimony concerning the probable cause for the arrest,---

MR. LYZOHUB: The reasonable cause for a preliminary breath test, and the probable cause to effect an arrest of the Defendant.

THE COURT: Okay, well I know there may other segments to your proceeding here, he was on the stand, what do we do with him now? You are finished with him?

MR. LYZOHUB: I am not completely finished with him, no, your Honor.

THE COURT: Well, let's do that. You can re-examine the witness, but are you through with your examination of the witness at this point?

MR. LYZOHUB: As to what he testified originally, yes, not as to what he might additionally testify to.

THE COURT: Another issue?

MR. LYZOHUB: Correct, your Honor.

MR. MILLER: Correct.

THE COURT: Okay, let's do it in that fashion. You may proceed.

MR. MILLER: Cameron Miller again, on behalf of the People.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Officer Bianchi, you did effectuate a stop of the Defendant; is that correct?

A Yes, I did.

Q What, if anything, transpired after that stop?

A I made contact with the driver, he was by himself. I

noted a strong odor of intoxicants about him. His eyes were glassey, and I recall that he was barefoot.

THE COURT: Barefoot, is that what you said?

THE WITNESS: Yes, sir. I advised him why I had stopped him, and asked him where he was coming from. He stated that he had an argument with his wife, and he was out for a drive cooling down. I asked him if he had been drinking alcoholic beverages during the evening, and he stated that he had. I asked him to exit the vehicle. We walked to the rear of his vehicle, and I demonstrated several sobriety test, and had Mr. Campbell attempt to do the same.

BY MR. MILLER:

Q What was the surface where Mr. Campbell was standing– strike that. Was Mr. Campbell standing or seated or lying down, when he was doing your field sobriety tests?

A Standing at all times.

Q What was the surface of– could you describe the surface that he was standing on at the time?

A I don't recall if it's– I don't recall the make-up of the shoulder, whether it is compressed stone, if it was dirt, I don't recall.

Q Where exactly was the stop effectuated?

A Across from the Hilton, at the top of the crest there.

Q By the Hilton, are you referring to the old Plymouth Hilton on Northville Road?

A The old Plymouth Hilton.

Q Were you yet to what was McAllister's Party Store?

A No, sir, we were between Tate's Cleaners and the north parking lot entrance of the Hilton.

Q Very well. What field sobriety tests did you ask the Defendant to perform?

A Alphabet, one leg balance, counting.

Q When you say alphabet, what were the results of that test, and what specifically did you request?

A If I could refer to my report?

Q If you need to, to refresh your memory, please do so.

A In the alphabet, I asked drivers to recite the alphabet stopping at the letter, Q. Mr. Campbell got to near the letter F, when he began calling out letters at random.
The next test that I asked him to perform was counting from 75 to 93. He left out a couple of numbers and he continued past 93 to 100. Counting

down from 93 to 75, again he left out a few numbers, and he went below 75.
The one leg balance, he lost balance on each foot, prior to counting to 1,005.

Q Where does he start counting from?

A From 1000 – I am sorry, 1,000 to 1,010, he lost balance prior to 1,005.

Q Did you demonstrate how he should do these field sobriety tests before you asked him to do so?

A I don't actually recite the alphabet, I asked him to do the alphabet, stopping at the letter Q.

Q Specifically with the one foot balance, did you demonstrate how he should perform the one foot balance?

A Yes, sir.

Q Did you have any difficulty because of the road surface, the surface where you were standing, in performing the balancing test?

A No, sir, I did not.

Q What, if anything else did you have him do?

A I read him his preliminary breath test - - - consequences, and administered the test. After that - - -

Q You said you read those tests, where did you read those tests from?

A Off the box of the PBT unit itself.

Q The box that carries the actual PBT unit has - -

A Yes, sir.

Q You read them right off that?

A Verbatim, yes, sir.

Q He consented to the PBT test?

A Yes, sir.

Q What if anything, happened after that?

A Believing that there was probable cause, I placed Mr. Campbell under arrest for OUIL, drunk driving. I asked him if he wanted me to tow his vehicle, or secure it, on the lit. He told me that he wanted it parked on the lot. When I asked him if he was sure, it was a rather expensive vehicle, he says that most definitely he wanted it secured on the lot.

Q What lot was that secured on?

A The old Hilton lot.

Q I am sorry.

A The old Hilton Hotel.

Q You did inform him at that time that you were placing him under arrest for OUIL?

A OUIL.

Q OUIL and UBAL. When you said you first stopped him, you informed him why you stopped him. What did you inform him at that time?

A I told him he was stopped for speeding and for going left of the center line, Hines Drive.

MR. MILLER: I have no other questions of this witness.

THE COURT: You may examine the witness

RE-CROSS-EXAMINATION

BY MR. LYZOHUB:

Q Now, is it true sir, that you activated your emergency flashers as you were on Northville Road?

A I believe I activated them before we got to Northville Road, and I saw that his turn signal was on, not wanting him to stop at the stop light in the intesection, I may have turned– I believe I turned them off, and then when he got up to the top of the hill, I re-activated them, for safety issues.

Q So, for all intent and purposes, it is reasonable to infer that he was made aware that you were attempting to pull him over, after he pulled out to Northville Road?

A No, I believe I activated them prior to him reaching Northville Road. I recall turning them off and then waiting for him to get to the crest of the hill, after he made his turn, and I re-activated.

Q He pulled over immediately when you activated your emergency flashers; did he not?

A The second time, yes. He may not have saw them come on the first time because when he came up to the corner, he did one of these numbers, and had he not been looking in his sideview mirror, it may have been difficult for him to see the lights. I don't recall how long I actually left them on for, knowing that he was going to turn, I didn't want him stopping where he was at, it was 4:00 in the morning. It was just a bad place to stop somebody.
If you are asking me if he disregarded my emergency signals, he did not.

Q Thank you. And, you pulled behind the Defendant when you effected the traffic stip; is that correct?

A Of course, yes.

Q Was there very much lighting in the area there, to your recollection?

A It is not in the City, I don't travel that road very much.

I am not sure that it is lighted.

Q So, it was necesarry to have him stand between the vehicles, so you could see him perform these tests with your headlights?

A Uh, it is not necessary. It wasn't necessary because of– that is my normal procedure, that's the way a police officer is trained to– where to do sobriety tests. Anytime you get somebody out of a vehicle, you want to protect them as well as yourself, with the biggest object, that being your patrol car. So, he was behind his car, but in front of my car. My car was offset from his, protecting the walkway between my car– the front of my car to his driver's side door. I had my overheads on, my headlights and I take down– which is a white light that shines to the front of my car, illuminating the area. It was rather lit.

Q You also thatat evening, moved my client's car into the hotel parking lot, at his request; is that right?

A Yes, sir.

Q Now, you were conducting an investigation upon my client at the time that you effected a traffic stop; is that right?

A Uh, he was stopped for suspicion of drunk driving, yes.

Q Did you have any evidence to indicate that alcohol was involved before you stopped him, the element of

alcohol, sir?

A Having arrested over 500 individuals for drunk driving in my career, certain things are indicative of people that are driving while under the influence or impaired. I saw several of those indications in Mr. Campbell's driving.

Q So, to you erratic driving is evidence, part of evidence of drunk driving; is that your testimony?

A Very frequently it is, yes.

Q Did you ever pull somebody over who was driving erratically that was not intoxicated?

A Sure, yes.

Q But, at that time you pulled him over, you did not have the probable cause to effect an arrest for drunk driving, did you?

A PAUSE.

Q The minute you were behind him, and pulled him over, did you have probable cause to effect an arrest for drunk driving?

MR. MILLER: I am going to object, it calls for a legal conclusion.

THE COURT: Sustained

BY MR. LYZOHUB:

Q Did you arrest him immediately after you pulled him over on the charge of drunk driving?

A Did I arrest him immediately upon stopping him?

Q Immediately?

A No, sir.

Q The field sobreity tests were necessary as part of your investigation; is that correct, officer?

A Yes, sir.

Q Did the ABC's have anything to do with operating a car?

A Knowing the ABC's having anything to do with operating a car?

Q Being able to do the ABC's, have anything with operating a car?

A No.

Q Officer, I would like you to demonstrate to the Court, what is a one leg stand.

A Sure. (WITNESS INDICATES)

Q Describe it so that the record is clear.

A Somebody– a driver is standing in front of me, and I ask them to stand on their left leg, raise your right leg up in the air, and count from 1,000 to 1,010

Q How far are you lifting your leg?

A Probably a foot or so.

Q In front of you?

A Yes, sir.

Q Okay, for ten seconds?

A From 1,000 to 1,010, it would be roughly ten seconds, yes, sir.

Q You asked them to do it for each leg?

A Yes, sir.

Q Now, if the Defendant drops his leg once to regain balance, has he failed that one leg stand test?

A He has failed to hold it from 1,000 to 1,010, yes, sir.

Q And so once he dropped his leg, you consider him to have failed that test?

A That particular portion of it, yes.

Q You are saying that you had him do ti for each leg?

A Yes, sir.

Q He did the same for the other leg?

A Yes, sir, he dropped his extended foot before getting to 1,005.

Q You didn't allow him the opportunity to resume the test did you, for either leg?

A I don't believe so.

Q I have in my posession, officer, a publication from the United States Department of Transportation, National Highway Traffic Safety Administration, DWI detection, and standardized field sobriety testing. Do you recognize the National Highway Traffic Safety Administration as an authority on safety, sir?

A Yes.

Q Do you acknowledge that this appears to be a student manual?

A I have never seen that.

MR. MILLER: Your Honor, I am going to object on the relevancy, how this applies to this case.

THE COURT: Right, particularly at an evidentiary hearing. What are you doing

questioning the method of sobriety tests, or sobriety tests themselves, or what?

MR. LYZOHUB: I will make an offer of proof, your Honor. The DWI detection, standardized field sobriety testing manual, that is put out by the National Traffic Safety Administration, dictates that with the one leg stand, a person is given 30 seconds, and he can actually touch the ground twice, before it is considered a failure That is impeaching the officer's testimony.

THE COURT: All right, we will take that. I will recognize that. We will move on.

MR. LYZOHUB: Thank you, your Honor.

BY MR. LYZOHUB:

Q Now, you arrested my client after you administered a preliminary breath test?

A Yes.

Q And, I believe you said he blew a– do you recall what he blew?

MR. MILLER: I am going to object, I don't believe it was asked or answered, your Honor.

THE COURT: It wasn't asked or answered, but if he wants to have it on the record,---

MR. MILLER: If he wants to ask, he can.

MR. LYZOHUB: I am going to withdraw the question.

THE COURT: Yeah.

BY MR. LYZOHUB:

Q If for example, the Defendant blew a .02 on a PBT, you would not have had sufficient probable cause for a drunk driving arrest?

MR. MILLER: Your Honor, I guess I am going to object to the form of the question. Is he saying that would be the only test administered in the field?

THE COURT: No, I am going to take the answer. He has opened the door on the preliminary breath test, I will take the answer.

MR. MILLER: I am just not sure, as to the form of the question. Is that the only field sobriety test, or is that one of?

THE COURT: I don't know what it is for but I will take the answer.

THE WITNESS: Can you repeat the question, please.

BY MR. LYZOHUB:

Q If for example, the Defendant blew a .02 on a preliminary breath test, you would not have sufficient probable cause for a drunk driving arrest?

A That test alone, without anything else?

Q If the Defendant that evening, blew a .02 on the PBT, is it true that you would not have had sufficient probable cause for a drunk driving arrest?

A Had he performed the other sobriety tests, with the results being the same as they were that night, and he blew a .02 on the PBT, he would have been arrested.

Q On what charge?

A On failure of the other sobriety tests. The odor of the intoxicants, his appearance, and his failure of the field tests.

Q Are you saying that the preliminary breath test is irrelevant?

A Uh, it can be.

Q Well, you drew your conclusions that my client was under suspicion for drunk driving even before you pulled him over?

A Yes, sir.

Q have you ever pulled a car over on a pretext, the car just happened to be in the area?

A What do you mean a pretext?

Q Well, for example, you will pull over every car that passes you on Hines Drive, regardless of whether there is any problems with the car?

A Do I pull over every car that passes me on Hines Drive, no.

Q Have you ever sat at Hines Drive and done that?

A And pulled over a car that passes me by, no.

Q Your subpoena to produce certain tickets, did you produce them for today's hearing?

A I was not served that subpoena.

MR. LYZOHUB: I served the prosecuting attorney.

MR. MILLER: I am not sure what you are looking for. You are asking for the other arrests that night?

MR. LYZOHUB: All tickets issues by police officer Bianchi, for any moving related violation including misdemeanor offenses, in which the alleged traffic violator was observed by Officer Bianchi, to travel upon Hines Drive, for the period of time from June 1, 1996

through present.

MR. MILLER: You got that.

MR. LYZOHUB: From June 1st to present?

MR. MILLER: You got what you asked for.

THE COURT: Do you know what you got in your subpoena, sir? This sounds liek you don't know what you got.

You are asking him a question, do you know the answer?

MR. LYZOHUB: Your Honor, –

THE COURT: This is getting a little ridiculous, okay.

MR. LYZOHUB: Your Honor, there are two different subpoenas at issue, here. The first subpoena I did not ask for that. The second subpoena, I amended it for purposes of this hearing.

THE COURT: Does he have these documents

MR. MILLER: Your Honor, it is my understanding that everything that he has asked for, in

either subpoena, has been complied with.

THE COURT: All right, let's move on.

MR. MILLER: With the exception of certain things which we objected to, which he is aware of. There was certain policies of the police department, which he objected to, and it is my understanding that was okay that we did not produce those items.

MR. LYZOHUB: Well, the hot pursuit issues, I think were –

THE COURT: I really wish we would stay with this case, okay.

BY MR. LYZOHUB:

Q You did not produce any such tickets, did you, officer?

A Did I bring any with me, no, sir, I did not.

Q Don't you go by the name of Hunter?

A No, sir.

Q Do you have your report with you, officer?

A I have a coy of it, yes, sir.

Q You testified previously that you were looking through both your rear and side mirror, when you observed my client?

A Yes, sir.

Q You don't mention any fact about looking at your side mirror, in your report, do you?

A I don't recall without looking at it.

Q Can you look at your report, please.

MR. MILLER: People would stipulate that the report does not indicate side mirror.

BY MR. LYZOHUB:

Q As far as number of occassions that you allegedly saw my client crossing the yellow line, you didn't indicate that on the report, you just said repeatedly?

A Yes, sir.

Q All the times that you are saying that my client corssed the yellow line were – was that turn around Woods Drive?

A No, sir, it would between Woods Drive and probably the C & O Tracks, which are just east of Wilcox.

Q Part of that is Plymouth Township, to your

knowledge, sir?

A I believe so, yes.

Q How many times are you saying – are you claiming that my client crossed the yellow line, along the ingress and egress of Woods Drive on Hines Drive that night?

A At least once, and then again coming out of the – where Woods Drive exists –

Q Can you approach the map and demonstrate for us where?

A Once between the two - entrance and exit to Woods Drive, once immediately here where it curves, and twice more in the more straight area, near Gonsolly.

Q So, when you testified previously five times, it is really four times?

A I believe it is four times.

MR. LYZOHUB: No further questions of this witness.

THE COURT: Do you have any further rquestions of this witness?

MR. MILLER: I have one on redirect.

REDIRECT EXAMINATION BY MR. MILLER

Q Officer Bianchi, at any time during the evening, did Mr. Campbell indicate to you that he had any physical reasons why he could not perform any field sobriety tests?

A No, sir.

MR. MILLER: No further questions.

THE COURT: Anything further?

MR. LYZOHUB: No, your Honor, I would reserve the right to recall him in the event of rebuttal.

THE COURT: I understand, you may step down.

(At about 11:32 A.M. witness exused)

THE COURT: Let me call a few other files. Whoever your next witness is going to be, get that next witness in here.

(At about 11:32 AM RECESS)

(At about 11:34 AM proceedings reconvene)

THE COURT: Okay, back on

the record, People v Christopher John Campbell. You can call your next witness.

MR. LYZOHUB: Do the People rest, your Honor?

MR. MILLER: People would rest, your Honor.

MR. LYZOHUB: My next witness is Jerry Borycz.

GERALD BORYCZ Called by the defense, at about 11:34 AM, sworn by the court officer, testified:

DIRECT EXAMINATION

THE COURT: Is there an issue as to his qualifications?

MR. MILLER: I have no idea who this gentleman is, or what he is going to testify to.

THE COURT: Okay, was his name given to your before?

MR. MILLER: Just now. But, I did not request it.

THE COURT: I understand.

BY MR. LYZOHUB:

Q Could you state your name for the record?

A Gerald Borycz. B-O-R-Y-C-Z.

Q Your business address, sir?

A 2074 South Wayne Road, Westland, Michigan, 48185.

Q Your occupation?

A I am a licensed private investigator.

Q Is that in the State of Michigan?

A Yes.

Q How many years of experience do you have as a licensed investigator?

A Over 20 years, and I have been licensed now for 12 ½

Q What is your training for purposes of being of being an investigator?

A Well, here in the State of Michigan you have to work under someone else's license apprenticeship for at least four years, a police officer for four years, or a college degree in criminal justice for four years.

Q You satisfactorily completed that requirement?

A Yes.

Q Your license is in good standing?

A Yes.

Q Were you requested by the Defendant to conduct an investigation?

A Yes, I was, sir.

Q You have your records in front of you?

A I do.

Q Would they assist you in your testimony here today?

A Yes, they would.

Q What was the prupose of the investigation?

A To determine several things, one the visibility of cars on Hines Drive in the nighttime. Part of the investigation was doing a time study, distance study, measurement study, looking over any discrepancies with the citation and dispatch records.

Q You also– part of your investigation deal with road conditions?

A Yes, sir, that is correct, the lighting conditions.

MR. MILLER: Your Honor, we have no objections to any testimony that may be ellicited from this witness, as to the things that he observed. But, as to specifics as an expert in road conditions, lighting conditions, discrepancies, I just don't believe I have heard

any testimony to be qualified as an expert in any of those items. I don't think being a licensed P.I. makes you a road and lighting expert.

THE COURT: I understand. I don't know how extensive he is going to get. The basic rule is to assist the trier of fact. I am willing to hear what he has to say, what he did, okay. You can proceed on that basis. Let's get right ot what he did.

MR. LYZOHUB: Absolutely, your Honor.

THE COURT: I am going to permit him to testify for that limited purpose, only.

BY MR. LYZOHUB

Q As to the issue– the ability to observe a car at night on Hines Drive, what did you do?

THE COURT: And when did he do it?

THE WITNESS: I did on several occasions. The first time was on October 22nd. We used two vehicles, one simulating the police vehicle and the other was Mr. Campbell's vehicle. It was done again on–

THE COURT: What time of the night?

THE WITNESS: Uh, that was at 2:55, sir, we took an hour into consideration for the time

change. The citation was at 3:55, I believe. We then on another occasion in November, I want to say the 11th– I believe it was the 22nd, we went back out there, this time what we used was a 1995 white, Crown Victoria, as a police vehicle, and also used the Mercedes as the other vehicle. This was to determine the visibility of the police vehicle, what he could observe through the rearview mirror, through the side mirror, and looking straight back. Also, the road conditions.

BY MR. LYZOHUB:

Q Do you have those videos with you?

A I do.

MR. LYZOHUB: Your honor, is the video machine set up?

THE COURT: Yes. How long are these videos?

MR. LYZOHUB: Sir?

THE WITNESS: Each runs for approximately 3 minutes.

THE COURT: Please move for the video. We can pick you up on that mike. Can we excuse the court the court reporter for the viewing of the videos?

MR. LYZOHUB: I believe I am going to ask the witness to testify, while the videos are being played.

THE COURT: Fine, all right.

(VIDEO EQUIPMENT SET UP AND POSITIONED)

THE COURT: We have to stipulate that this will not be on the record, do you understand that?

MR. LYZOHUB: Okay, we will move the admission of the video tapes themselves into evidence.

(At about 11:40 A.M. DX7, DX8, DX9, DX10, DX11, marked by reporter)

MR. MILLER: I would like to reserve an objection until after we see what it is that is going to be presented.

THE COURT: Your objection is noted on the record. I understand that.

MR. MILLER: That is a continuing objection.

THE COURT: Yes.

MR. MILLER: Thank you.

(DX 7 PLAYED FOR COURT)

BY MR. LYZOHUB:

Q You are putting in the video player, what has been

marked as DX7?

A That is correct. The date on this one is November 21, 1996, this was taken during the daytime hours.

THE COURT: Of that date?

THE WITNESS: Yes, sir.

THE COURT: You testified before you went out there in October.

THE WITNESS: I did.

THE COURT: What time of day is this?

THE WITNESS: This was a little after 4:00, sir.

THE COURT: Is that relevant? Let's stop right there.

MR. LYZOHUB: It is relevant to the extent, your Honor, that it shows what the road is during the day light, to show the dips in the curves and the—

THE COURT: For that purpose, okay.

BY MR. LYZOHUB:

Q Can you describe for us what is going to be played as

DX7?

A As counsel just said, the reason that we took this one here, was to show in the daylight hours the bumps, the curves, the crests of Hines Drive from Haggerty Road to Northville Road.

THE COURT: I am familiar with that too. Go ahead.

THE WITNESS: This is starting off at Haggerty Road, approaching the first turn. We are coming right around the curve, we are coming up to–

COURT REPORTER: Can you please mute the sound on the video?

MR. LYZOHUB: Could you stop the tape please, sir. We will silence– your Honor, the Court reporter is having a difficult time picking that up off the video tape, I am going to suggest that we silence the video tape.

THE COURT: Just mute that.

THE WITNESS: I will.

THE WITNESS: It is not working, your Honor, I will check it up there. There we go.

THE WITNESS: Now, we just left the area of the exits into Woods park drive, it is one way road. This is the exit right here, you can see the one way sign You can see the sign to the right, it says Township of

Plymouth.

BY MR. LYZOHUB:

Q You see that part of the road, is that– can you stip the video tape, please and back it up.
You are approaching now– can you back it up beyond the– before the overpass?

A Overpass, yes.

THE COURT: Are you in the City of Plymouth right now?

THE WITNESS: Yes, it is the City. I am only saying that, your Honor, because the sign there says, entering the Township.

THE COURT: I am just asking you?

WITNESS: Yes.

BY MR. LYZOHUB:

Q Now, the road takes – is that a hill that we are approaching?

A Yes, I was just about to say that. This little hill there, and then it dips back down. As you can see in the road there, it dips down.

Q That road that we just passed, what was that?

A That was the other park, Riverside, I think it was.

MR. MILLER: No, that would be Gunsolly Road.

THE WITNESS: Gunsolly, I am sorry, thank you. The overpass there. You can see the big crest there, this is just before Wilcox. There was a big crest there. I wanted to show that, so it wold be very hard to see cars coming behind you, because of that crest.

BY MR. LYZOHUB:

Q What is that light that appears there?

A What light?

Q What light is that?

A That is Wilcox Road, we just passed Wilcox Road. There is another turn right hereto the left, we are approaching Northville Road.

MR. MILLER: Your Honor, I would object as to relevancy. This portion here is all in Plymouth Township.

THE COURT: I understand, but that car in front up there in the video, how far would you say that was from your car?

THE WITNESS: I would approximately say about 8, 10, – you got to understand that is

also in the daytime, there is a difference.

THE COURT: I know, I am just asking you how much.

THE WITNESS: Okay, thank you. This is Northville Road, we made the turn here, and we are going to stop this, your Honor, where the stop took place on Northville Road. It was just south of the hotel there.

MR. MILLER: I am going to object to that testimony.

THE COURT: He doesn't know that.

THE WITNESS: This is what the - - what was told to me.

THE COURT: Well, just let him do his narrative. I understand, you were never there obviously, that night?

THE WITNESS: No, your Honor, I was not.

BY MR. LYZOHUB:

Q Okay, was there anything else?

A This hereis takendirectly from the rear seat, looking right through the rear window. The reason why this was taken, is to show again the curves and the dips and the hills in the road.

Again, we are approaching - - that is Haggerty Road, we just left. We are approaching the first curve there. We are coming up to the entrance into Woods Drive. We just left it. Now, as you can see there is a hill there, and it is a very short straight-a-way, and then it curves off again. We will see the exit of the parkway.

Again, it dips down there, you can see that a little bit.

MR. LYZOHUB:

Q That is a continuous curve between - -

A Continuous curve from just past the short straight-a-way, okay, here it comes now. There is the exit right there. There is a long curve right around the parkway there. Again, right now you will see the sign to the left, that we are entering into the Township.

Q Now, was the camera ina the same spot, You weren't moving it from side to side?

A No, it was rested on the back, – inside of the back deck of the vehicle. The vehicle we used on this occasion was the Crown Victoria. You can see the other curve in here, hereis the crest again, We are approaching now Wilcox Road, your Honor.

Q Is this a correct statement that at times, because the camera is fixed, youare going to lose sight of the road because of curves?

A That is correct.

MR. MILLER: Your Honor. I am going to object, on relevancy. What the camera's eye sees and what the rearview mirror sees, it can be two completely different things.

THE COURT: There is no question about that. I will sustain that. I am going to watch the video. Your objection is noted, understanding fully that eyes move differently than cameras, okay.

THE WITNESS: Now, we are making a turn up here to Northville. Again, it was stopped right on Northville Road, just south of the hotel. From these photos, you can also see the road condition on the side, the gravel. That is all for that one.

BY MR. LYZOHUB:

Q Now the next tape is marked as DX8, can you put that into the video player, please.

A This video is also taken during the daytime, but what is shows, we wanted a clear shot, it shows the front shot - - from the front shot, - - the rear mirror, - - what we are going to use is the rearview mirror on the car, plus the driver's side mirror. That is where we are ging to pick it up at.

THE COURT: Okay.

THE WITNESS: Otherwise, the first would be redundant to the tape you just watched.

BY MR. LYZOHUB:

Q Which vehicle were you in?

A On that day, that was using my own vehicle. That was done on the 20 - - it was in October. I have to look at my notes.

You can see from these notes – this is looking through the rearview mirror. Now, it is not a fixed camera as it did on the others. I used my eyesight to focus in on the camera.

You will notice on the curves here, the car was behind there, sitting in the driver's seat, camera right there, very difficult to see.

Q Now, the mirror, did you have an opportunity to compare the size of the mirror in your vehicle, as compared to the Crown Victoria?

A Yeah, the Crown Victoria measured 10 inches, this rearview mirror was just slightly shorter, I think it was a 9 and 3/4.

MR. MILLER: Your Honor, I am going to object.

THE COURT: Actually, we are into an area where it is a factual dispute, what he saw, what he projects and so forth. I am not sure that goes to the heart of this motion.

MR. MILLER: The only thing that this may be proving, is that the investigator may be guilty of reckless driving, for taking videos while he was driving down the road.

THE COURT: I don't know about that. I mean, it doesn't really get into the factual dispute, there is no way you can put yourself in the mind of the officer, the eyesight of the officer.

MR. LYZOHUB: Well, your Honor, -

THE COURT: Unless you are going up a huge, steep hill, and I am very familiar with the terrain there. That is a question of fact, really.

MR. LYZOHUB: Well, we are producing demonstrative evidence. We have video tapes of night, this witness - - we have some testimony from the officer as to what conditions were there that evening - -

THE COURT: That would be a factual dispute for the jury to decide, if you ultimately go to the jury; wouldn't it?

MR. LYZOHUB: I believe it is an issue before this Court, your Honor. I do have my issues as set forth in my motion.

THE COURT: If you could project that it would be impossible for the officer to see, I would say, okay, you have a point. But, I don't think you can say that it

is impossible. He said that he saw what he saw, okay.

MR. LYZOHUB: If the Court would bear with me, and allow me to play –

THE COURT: Well, I will watch the videos. There is no question about that. But, I just make those comments, whatever.

THE WITNESS: Now, this is continuing up into Northville Road. You can see when we take the curves on this thing, we do lose contact with the car that was behind us.

The next shot that is coming up, this was taken looking out through the side mirror. Now, this mirror is larger than the one on the Crown Victoria. Again, the reason that we took this one here, is to show looking through the rearview mirror, that on the curve that is going to be coming up here, how you lose sight of a vehicle.

BY MR. LYZOHUB:

Q Is this for, – did you say rearview or –

A I am talking about sideview, I am sorry.

Q Which side, the driver's?

A This is on the driver's side naturally, where Officer Bianchi would have been glancing at. You can see the curve right there, and you can just barely see any cars

behind you, there.

Q Which lane is that showing?

A This is going, I would say north on -

Q Sir, you observed that car that just went through - -

A Yeah, that was going the other direction.

Q The opposing lane; is that correct?

A That is correct. Notice on that curve, how quickly you lost sight of that vehicle.

THE COURT: Let's suppose that you lost sight of him in the sideview mirror, you could pick him up in the rearview mirror, couldn't you? You pick up more in the rearview, than you do the sideview.

THE WITNESS: That is ture. But, you also lose him rel fast, too, in our test. I was doing both, your Honor, as the police officer was I am sure, looking at both.

THE COURT: Okay.

THE WITNESS: I am demonstrating the curves and looking back.

BY MR. LYZOHUB:

Q Now, what kind of vehicle were you driving?

A The vehicle that we have right there was a Villager, 1995 Villager. Like I said, the side mirror is a little larger than the Crown Victoria.

Q Can you tell the Coourt generally whether or not that sideview mirror is at a taller or shorter distance, or equal to the Crown Victoria sideview mirror?

A The size of the mirror, no.

Q No, the height of the mirror?

A No, the height was probably a little taller than the Crown Victoria, only because it is a van, the Villager.

THE COURT: Did you at any time have rearview, side windows open?

THE WITNESS: Yes.

THE COURT: Would that not obstruct your vision? I noticed that.

THE WITNESS: No, it only opens up about 3/4 of an inch.

THE COURT: I know, I have a van.

THE WITNESS: That is not obstructing the vision right now, I am looking right at it.

THE COURT: There were

some indications before.

THE WITNESS: Again, you can see on the curve, why we did this test.

BY MR. LYZOHUB:

Q That is again, the other lane?

A Yes.

THE WITNESS: This is coming up to, I just passed Wilcox, right now. It is coming up to Northville, I believe that is what it is.

We are making a turn onto Northville. This is the end of the tape here. This pulling over again, just south of the hotel there.

BY MR. LYZOHUB:

Q Now, you have a tape marked DX9 - -

THE COURT: Well, we are going to have to stop here. This is the end of this tape?

THE WITNESS: That is correct, your Honor.

THE COURT: I have a couple of other matters, we are going to recess until 1:30 on this file.

MR. MILLER: Officer Bianchi is scheduled to be in Circuit Court at 1:45 today.

MR. LYZOHUB: Thank you, your Honor.

THE COURT: Well, I can't help it.

MR. MILLER: Maybe another date or something?

THE COURT: That is up to you.

MR. LYZOHUB: Whatever the Court pleases, your Honor.

THE COURT: This thing has ben dragging on a little longer than I would like. We can set it for another date if you want. I am prepared to be back here at 1:30.

MR. LYZOHUB: So is the defense, your Honor.

MR. MILLER: We could simply indicate to Circuit Court that he is under subpoena to be here.

THE COURT: Okay. I don't know, how much longer do you plan on being with him, the officer?

MR. LYZOHUB: There are three other tapes, which are - -

THE COURT: No, the tapes, we will get back to the tapes right away at 1:30. But, to use the officer, so that he can be downtown.

MR. MILLER: Your Honor, I think that I need the officer in case we need some rebuttal testimony.

THE COURT: All right.

MR. LYZOHUB: I wouldn't need him at this point.

THE COURT: Okay, I will let you figure that out. We will resume this at 1:30.

MR. MILLER: Can we leave our things in the courtroom?

THE COURT: You can leave everything right there.

MR. LYZOHUB: Thank you, your Honor.

THE COURT: Sorry about that, that is the way that it is going to be.

(At about 12:00 PM RECESS for lunch)

THE COURT: Okay, we are back on the record on People vs. Christopher John Campbell.

At about 1:37 PM proceedings reconvene)

THE COURT: You may proceed. You are still under oath.

THE WITNESS: I understand.

THE COURT: You can go to the next tape.

BY MR. LYZOHUB:

Q Identify the tape, please, that you are putting into the machine.

A This is DX9, taken on November 22, 1996, approximately again abound 2:55 A.M. This is looking through the back windown of the vehicle, ranging from four car lengths to eight car lengths.

The reason this particular tape was taken was to show looking out the back window of the - -

Q All these tapes are involving Hines Drive; is that correct?

A That is correct.

(TAPE MALFUNCTIONS)

THE COURT: Is this the beginning of the tape now?

THE WITNESS: No, I don't know what happened to the tape. It doesn't look like it is rewinding.

THE COURT: It should

THE WITNESS: It is now. Thank you. Starting again at Haggerty Road on Hines Drive. We started off, should have been eight car lengths, and he was clsing up to four, that is why I said it varies between four and eight. The main reason for this is to show the - - even at this car length here, looking at the yellow line, - - it is not that visible. We are at eight car lengths now.

THE COURT: But, it is visible?

THE WITNESS: Pardon me?

THE COURT: It is visible, I can see it.

THE WITNESS: Your Honor, on the straight-a-way, - - but you will notice on a curve, as is coming up, - - there we go, - -

MR. MILLER: Your Honor, I would like to note my continuing objection.

THE COURT: It will be on the

record, or is on the record.

BY MR. LYZOHUB:

Q How many car lengths at this point in time?

A This is approximately seven right now. This is not - 0

Q Is this looking through the rearview mirror?

A No, this is looking right through the back window right

now. I have the other one with the rearview mirror. This is looking right through the back window. So, I have a larger area to look at, for one thing. As you can see from this, that the car is approaching closer than the eight car lengths.

THE COURT: Mr. Miller, I probably should have, – do you want to ask questions after each tape, or not?

MR. MILLER: We can go back over them if you need to.

THE COURT: That is up to you.

MR. MILLER: That's okay, thank you very much.

BY MR. LYZOHUB:

Q What number are you putting in now?

A This is DX10. This was also taken on November 22, 1996, approximately 2:55, in that area. This was twelve car lengths, approximately 192 feet. Now, this is looking through the rearview mirror.

Q When you said 2:55, are you talking A.M. or P.M.?

A A.M.
This is looking through the rearview mirror, and the car behind is approximately 192 feet. The rearview mirror is right up in this area, right here, your Honor.

THE COURT: I can see that.

THE WITNESS: Okay, thank you. Not that is right after it turns, — there is another curve, that is why we lost it right there.

BY MR. LYZOHUB.

Q. Is that 192 feet - -

A. That is approximately 12 car lengths, at least.

Q. How do you base that on?

A. Well, you mean the footage?

Q. What do you deem an average car?

A. An average car length is 16 feet. To set this up, –here on the straight-a-way, and on another curve we just lost it. I will explain it later.

The camera was going throughout the whole drive. As you can also see at that distance, the yellow line is definately not visible.

THE COURT: Let me ask you something. If somebody crossed, let's say, an imaginary center line, you would be able to tell that; wouldn't you?

THE WITNESS: Well, imaginary, – because the car might weave from the white over to the yellow –

THE COURT: I understand that part.

THE WITNESS: It would be the position of the police vehicle, where that was, okay. If he was closer to the yellow line, or in the center, or to the white line.

THE COURT: Right.

BY MR. LYZOHUB:

Q Now, during these midnight runs, so to speak, the only lighting – what lighting was available in that area?

A The lighting started– what is was, lighting was on Haggerty Road, next again to – at Wilcox Road, and then on again to Northville Road.

Q So, is it fair to say the only lighting available, would be from the headlights of a car?

A That is correct.

Q Do the – this might sound like an overly simple question, but, when the car is travelling on a curve, which was are the headlights pointing?

A Well, it depends on what curve we are talking about. If I could demonstarte on that for you. On this curve right here. (INDICATING) well, the headlights are always going to be straight, for one thing. So, on a curve, it's not going to follow until you hit the peak of the curve.

Q Can you demonstrate it for us?

A Okay, I will use these two vehicle here. (INDICATING) If the police car, according to the report was in the frong, Mr. Campbell's car in the back, - - on a curve as you can see, the lights are not – are going straight, they are not going to be following the curve itself. They don't make cars like that. So it would be difficult for the car, in the front – even without using the tapes, – for that vehicle to see what is in the back, because the lights are straight ahead.

We did take measurements, we will probably talk about later of the beam of the headlight, - - the headlight beam itself, the distance where that spreads out.

Q So when you said you traveled this many times, how many times did you travel up and down, in relation – for the purposes of this case?

A Since I was assigned to this case, I would venture at least 75 times.

Q How many times during the day?

A Probably 25, and 50 or a little more than that at night. The reason why I did that, without the video – I wanted to – not case it, I just wanted to prove to

myself, over and over again, what I am seeing is correct, and what the camera saw was correct.

MR. LYZOHUB: Your Honor, if necessary I move that we have this Court actually do a test drive on Hines Drive, in order to verify the –

MR. MILLER: At 3:00 in the morning?

MR. LYZOHUB: Well, I know that —

THE COURT: They wake me up for search warrants, but I don't think for this.

MR. LYZOHUB: My point is, your Honor, that —

THE COURT: I understand your point. I have several questions for this witness, but I don't want to interrupt you. You finish your stuff and then I will let Mr. Miller do his thing, and then I will get into the act, okay.

BY MR. LYZOHUB:

Q Thank you, your Honor. Your fifth tape, sir, which was marked as DX11.

A Okay, this tape starts off, just approximately 1,000 feet or so from Wilcox Road, and it — just starts off by the overpass, just by the – here we go, – as we up the crest, we are coming up to Wicox Road. The

reason that we did this, we parked the white, Crown Victoria right on the side where, I believe the report said, that it was on the side of the road, to show the visibility of that vehicle from a distance away.

THE COURT: What is the furtherest distance away that you can see that vehicle?

THE WITNESS: We were approximately 750 feet away, when we picked it up.

THE COURT: It looks like quite a ways you can see that.

THE WITNESS: Pardon?

THE COURT: Looks like you see it for quite a ways.

THE WITNESS: To know that it was a police car, yes.

THE COURT: Okay.

BY MR. LYZOHUB:

Q Did you tape all the tapes maked as DX8-11, personally?

A Yes, sir.

Q And, did those movies accurately represent the activities in which you described to this Court?

A That is correct.

Q Can you describe to the Court the type of camera that you used in making the tapes?

A It is a Panasonic with a ½ inch format. (sp)

Q Can you tell the Court the type of tape you used and the speed at which you ran the tape?

A It was a ½, and it was a 2 hour format on it.

Q Did you check the tape recorder, to see if in fact, it was operating at the speed?

A Yes, I did, in fact, three weeks before that I had it in for an inspection, as I normally do.

Q How was the condition of the equipment as you used it on the days in question?

A Very good.

Q What were the conditions of the tapes before you used them?

A They were brand new tapes, just taken out of the box.

Q Did you view the tapes once they were recorded?

A I did.

Q What did you do with the tapes, once you recorded them?

A The tapes are kept in a locked drawer, in a locked inter-office.

Q Are the tapes the true and accurate reproduction of the events in question, at the time recorded?

A Yes, they are.

MR. LYZOHUB: Your Honor, I move that DX7-11, be admitted into evidence.

MR. MILLER: Object, your Honor. They may have been true and accurate reproductiono f what this witness saw, but whether or not they were a true and accurate reproduction of what Officer Bianchi saw, —

THE COURT: Well, that will go to the weight of the evidence, as far as I am concerned. I am going to admit the tapes. I understand what you are saying.

(At about 1:50 P.M. DX7-11 admitted by Court)
(At about 1:51 P.M. DX12-19 marked by reporter)

MR. LYZOHUB: The record should reflect I am offering the exhibits to the Prosecutor. These are the photographs that I showed you previously.

Move to admit, I believe a stipulation for DX12-19.

THE COURT: Any objection?

MR. MILLER: No objection, they are being admitted, I am told for the purpose of showing the conditions and the representation of the road.

THE COURT: Any objection?

MR. MILLER: No objection, they are being admitted, I am told for the purpose of showing the conditions and the representation of the road.

THE COURT: They will be admitted.

(At about 1:52 P.M. DX12-19 admitted by court)

BY MR. LYZOHUB:

Q Can you tell, — incidentally, you are the one that took all those pictures; right?

THE COURT: Well, they have been admitted, so you don't have to do that.

BY MR. LYZOHUB:

Q All right. What is DX12, sir?

A DX12 is taken from near Haggerty Road, upon Hines Drive.

Q What distance?

A From – we are just west of Hines Drive when I took it, I didn't write the distance on that.

MR. MILLER: Your Honor, we ask that the Court could take judicial notice of the exhibits. I

think you have probably driven the road enough, that you can identify them yourself.

THE COURT: That is true, more than 75 times.

MR. LYZOHUB: The only thing, your Honor, is that this witness, I belive can identify at what point in the road, each of those pictures demonstrate.

THE COURT: I tell you what would be helpful, if he could go up to that board, and use that drawing, and say this is where this picture was taken, this was where this picture was taken, and so on. That is what I would do if I was sitting down, where you guys are.

MR. LYZOHUB: Very good, your Honor.

THE COURT: Perhap's you were going to do that, Mr. Miller, I don't mean to interject myself.

MR. MILLER: I figured you knew that road well enough, you could probably tell exactly where each of those photos were from.

(At about 2:00 P.M. DX20 marked by reporter)

THE COURT: Well, here is what I would like to do. A police officer has testified that he saw the lights at a certain point, in his rearview mirror. I would like to direct your attention to those areas, that he said, that he testified to.

THE WITNESS: Well, I am not

privileged to that, sir.

THE COURT: Well, wouldn't that be important.

MR. LYZOHUB: Well, that is what my point of having him in the courtroom - -

THE COURT: I understand that.

MR. LYZOHUB: That is important.

THE COURT: That is very important. All the other diagrams and pictures of the road don't really mean anything, except when the officer said he saw the lights in the review mirror, where did he see those lights, and I am to look at all this testimony and pictures and etc., and say: is that possible? That is really what we are talking about.

BY MR. LYZOHUB:

Q Mr. Borycz, I would direct your attention to the area in the middle, between ingress and egress of Woods Drive, on that aerial map?

A We are talking from this area to this area? (INDICATING)

Q Yes, sir.

A And your question is?

Q Okay, can you identify in those photographs, where that area is?

A This photograph DX2 was taken approximately 2/10ths of a mile, west of Haggerty Road –

THE COURT: Photograph 2, you mean DX13?

THE WITNESS: Well what I marked number 2, is DX 13, your Honor.

THE COURT: That is what we do.

THE WITNESS: Number 13, that was taken just starting off in this area right here. (INDICATING). Then we are following on DX14, you can see it was taken right in this area right here. (INDICATING)

THE COURT: Now, the question is, I don't mean to keep interrupting you. If a car was behind that car, in that area, could they see the headlights in their review mirror?

THE WITNESS: All depends the distance. I am not privilege to that.

THE COURT: Well, for how far back could they see then?

THE WITNESS: Okay, from here, starting right at the curve itself, okay, you – that car has to be at least 8 car lengths to see it, anything beyond that it starts to

dim down. I could demonstrate probably better on that, to show you.

THE COURT: Well, this is more accurate than that, I think.

THE WITNESS: Well, I am talking about with the vehicles, the length of the vehicles, and how the lights would shine. Then you got this large curve here, and if you are looking straight at the mirror, side or rearview mirror, at that distance, anything over 12, you can't see it.

THE COURT: 12 car lengths?

THE WITNESS: Yes. As you can see in this photograph here. Then from hereto here, and there is a listtle straight-a-way, and then you got a curve here. But, in though this area, you have your dips, your little hills –

THE COURT: Wait a minute. Let me interrupt for a second. It is my job to get at the reality of this thing. If they could see back at the point you are taking about, 12 car lengths; is that what you said?

THE WITNESS: I said they can't see beyond that.

THE COURT: Well, beyond that, but they can see approximately 12 car lengths? Is that a fair statement?

THE WITNESS: No, a fair statement would probably be, your Honor, between – to find out if they crossed the center line, or if you see a light back

there, would probably be between 8 and 12, as we show in the video.

THE COURT: Well, what is it, 8 or 12? That is quite a distance, 8 or 12.

THE WITNESS: Yes, sir, 32 feet, – I would say 10 car lengths.

THE COURT: Okay, 10 car lengths would be 160 feet; right, if the car is 16 feet long?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: Okay, and then you have the curve –

MR. LYZOHUB: Let me, if I could ask this question, sir. I don't know if it was asked in this way. Are you saying that you can see the headlights, at 10 car lengths, or are you saying that it is possible to see whether a car, can cross the yellow line?

THE WITNESS: You can't see the headlights.

MR. LYZOHUB: At 10 car lenghts?

THE WITNESS: At that 10 car lenghts, on that curve.

THE COURT: Well, it depends on

where you are?

THE WITNESS: Yeah, on a straight-a-way, yes, you can, there is no doubt about that. But, not on this curve.

THE COURT: All right.

THE WITNESS: Your Honor, this is a big curve right through there. As you know, you have traveled it quite a bit

THE COURT: Right.

BY MR. LYZOHUB:

Q Now, let's assume the next point, is this X on this diagram here. Is there anything about that particular road condition to make it difficult to see headlights?

A Right in this area, yes, you have some dips in there.

Q Do you have a photograph to demonstrate that?

A The videotape definately did, yes. You saw in the videotape, as the dips go down, you saw the headlights in the rearview mirror, and then it comes down, and it comes right back up again.

Q As to a curve?

A AS to a curve it would move to the side, you know.

THE COURT: Well, let me put

it this way. Even if there were dips, you could still see lights, or probably something, at that time of night, if there are no other cars on the road, you could probably tell some car with lights on is behind you; could you not?

THE WITNESS: You could see the beginning of the lights, yes.

BY MR. LYZOHUB:

Q Could you identify where Wilcox Road is?

A Wilcox Road is right here. On that Wilcox Road, I have taken it from Wilcox, and that, your Honor, is DX17, that particular photograph was taken just – right in this area on Wilcox, – right before you get to Wilcox Road. It would also show how it curves down into this, right to the left.

Q What exhibit number is that, sir?

A That is DX17. Then, – basically just in the same area, the next photograph was taken just in this area, that was number 18, just basically in this area. It shows, – I had the camera straight on, where you could see that curve again.

MR. LYZOHUB: Your Honor, I mov3e for the admission of the aerial map, as DX20.

THE COURT: Any objection?

MR. MILLER: No objection.

THE COURT: It will be admitted.

(At about 2:03 DX20 admitted by court)

BY MR. LYZOHUB:

Q During these passes on Hines Drive, that you have made at night, did you ever see patrol vehicles there?

A Yes.

Q Where did you see them?

A Either at – some following me, some coming the other way. I saw at the exit at Woods Drive there, I saw maybe six times, I saw a police officer sitting there. His car sitting right in there. Right there. (INDICATING)

Q Is that where my finger is pointing?

A Correct.

MR. LYZOHUB: Your Honor, to give some dimension to the aerial, I have the Affidavit of the person who created the enlargement, via order through Southeastern Michigan Council Government. I would like to have that admitted into evidence.

(At about 2:05P.M. DX21 marked by reporter)

THE COURT: Any objection?

MR. MILLER: May I see it pleasse?

MR. LYZOHUB: The proper proof that one inch equals 200 feet. That is notarized, from out of State.

MR. MILLER: No objection, it is probably pretty close.

THE COURT: There being no objection, DX20 will be admitted.

(At about 2:05 P.M. DX21 will be admitted)

MR. LYZOHUB: That would be 21, your Honor.

THE COURT: Oh, is it. I had 19 for the pictures, 20 for the aerial map. I am sorry, you are right.

BY MR. LYZOHUB:

Q Sir, can you actually see cars on this aeriel?

A Yes.

Q If you look at the map close enough, you could see the cars travelling?

A That is correct.

Q Can you see any cars travelling there, about 12 car lengths?

A Approximately – I would imagine, maybe, these.

COURT REPORTER: The witness is mumbling, could you please speak up.

THE WITNESS: I am just studying it, I am sorry.

Not really, – if it was in here, I would say yes. I can't find any closer than that.

Q There are some cars that are closer, but –

A Right, not 12 though.

Q Did Mr. Campbell indicate to you where the field sobriety tests were conducted?

A Yes, he did.

Q Per his direction, were photographs taken of the area in which the field sobriety tests were administered?

A Yes, there were.

MR. MILLER: I am going to object at this testimony. I think this is not the best witness to say–

THE COURT: That is true. I think Mr. Campbell is the best witness, of what he told him. I have some serious questions about that.

MR. LYZOHUB: What I would like to do, you Honor, since he is on the stand now, is to admit the photographs and—

THE COURT: They have been admitted.

MR. LYZOHUB: No, these are new ones.

THE COURT: I am sorry.

(At about 2:08 P.M. DX22-25 marked by reporter)

MR. LYZOHUB: Then instead of recalling Mr. Borycz, for authenticating them, then Mr. Campbell can tell us.

THE COURT: Go ahead, you can go ahead. These are 22 through 25.

In fact, if any of those pictures are accurate places where he did take it, that would be very helpful, and speed up the process. If you can agree on which one of those pictures, is where he took – or did the sobriety tests, that might expedite things a little bit.

MR. MILLER: People will stipulate that what has been marked as DX24, just past these group of mailboxes, is where the field sobriety tests were performed.

THE COURT: Is that agreeable to you?

MR. LYZOHUB: That is agreeable, you Honor. I think my client might embellish upon that. I accept the stipulation—

THE COURT: Well, I have no problem with him commenting on that. Is that the area where the sobriety tests were conducted?

MR. LYZOHUB: Could I ask him?

THE COURT: Sure.

MR. LYZOHUB: We will stipulate.

THE COURT: Thank you, that is number what?

MR. LYZOHUB: Number 24, you Honor.

THE COURT: Any objection to that being admitted?

MR. MILLER: None whatsoever, you Honor.

THE COURT: It will be admitted.

(At about 2:09 P.M. DX22 and DX24 admitted by Court)

MR. LYZOHUB: In reference to having DX22 admitted, to the extent that it is the same—

THE COURT: Same area?

MR. LYZOHUB: Same grade of gravel–

THE COURT: Is that the gravel at the sobriety test location; that is the question?

MR. LYZOHUB: I don't know. I could ask a few questions to the investigator.

BY MR. LYZOHUB:

Q Sir, you were on this gravel part of the road, on Northville Road?

A Correct.

Q Were you able to travel that area of the road?

A Correct.

Q Did you make any observations as to the grade or quality of the shoulder from the points where you were taking pictures?

A Yes, what I did, in DX24, there is a few houses not in this photograph, but–

THE COURT: I know exactly where it is.

THE WITNESS: What I did, you Honor, as I walked 100 feet this way, and 150 or 100 feet that way, for my own mind to make sure that everything is the same. Then after taking this photograph, I took just a close up, this represents all this whole area right here, with the gravel.

THE COURT: Basically, it is the same?

THE WITNESS: The same, exactly.

THE COURT: Just past the cleaners?

THE WITNESS: Well, I don't know where the cleaners is at.

THE COURT: You will, if you have driven it 75 times, you should have noticed it.

THE WITNESS: Well, on Hines Drive, I have driven it 75 times.

THE COURT: Oh, not on this road?

THE WITNESS: Pardon?

THE COURT: Not on this road, you haven't driven it that many times?

THE WITNESS: No, because my main thing at the time was the curves, that was what I was looking at.

BY MR. LYZOHUB:

Q Did you do any studies on lighting conditions?

A Yes. In this area, – right past the – across the parkiing lot, there is a light there. There is one– I am not sure of the name of the street, I think it is Clements or

something. What lighting, was poor in that area.

Q Did you measure the distance between Haggerty Road to Wilcox Road, sir? You may refer to your report.

A Thank you, Haggerty to Wilcox?

Q Yes, sir.

MR. MILLER: Your Honor, the witness is looking at something to refresh his memory. I think we are entitled to see it first. I would like to see it.

MR. LYZOHUB: Absolutely.

THE COURT: I have no idea what he is looking at.

THE WITNESS: Here.

MR. MILLER: Fine, thank you, your Honor.

BY MR. LYZOHUB:

Q How much distance exists between Haggerty Road and Wilcox Road?

A Approximately a mile and a half, sir.

Q Now, how much distance exists between Haggerty Road to Northville Road?

A To Northville Road?

Q Yes, sir.

A I don't have it, I ran it up to where he allegedly was stopped at.

Q What was the distance for– to where he was stopped from Wilcox?

A Approximately ½ mile.

Q So, the distance then all the way through here, to here, (INDICATING), right there? This is Northville Road?

A Right.

Q To there, so approximately 2 miles?

A Yes.

Q Can you from this aerial, sir, identify where the hotel is, off of Northville Road?

A Yes, I can.

Q Can you show us where that is?

A WITNESS AT MAP, INDICATING. Here, and the parking lot.

Q Did you measure the time, the lapse to go from Haggerty to Northville Road, at 40 miles an hour, sir?

A If I could refresh my memory here, it was 3 minutes

and 30 seconds.

Q As part of your investigation, did you reinact the time lapse, for pulling the Defendant over from Wilcox, to where he was stopped, with the testing, ABC's, one leg stands, and parking the Defendant's vehicle?

MR. MILLER: I am going to object on any speculation of that. How would he know?

THE COURT: Really, sustained.

MR. LYZOHUB: Do you think that we could ask the witness to see what he did, to do that?

THE COURT: How can he know that? He is not under the same circumstances. We have given you quite a bit of latitude already. But, there is no way that this guy can re-create, unless he perhaps had something to drink, and was re-creating, you know. It is not the same.

THE COURT: You didn't have anything to drink when you did all these tests, did you?

THE WITNESS: No, I am not a drinker.

BY MR. LYZOHUB:

Q I was asking the witness to reinact it, from the viewpoint of the officer, not the viewpoint of the Defendant.

MR. MILLER: Same objection.

THE COURT: Yeap, sustained.

MR. LYZOHUB: No further questions at this time.

THE COURT: Okay, Mr. Miller?

CROSS -EXAMINATION

BY MR. MILLER:

Q It is my understanding that you testified that you could see a car around, – I am going to call it the Woods Drive bend, for lack of a better name, – this bend here, because of the curve in the road, approximately 10 car lengths; correct?

A You can see a car, no.

Q Did you say 10 car lengths, how far you could see the headlights behind you?

A You see lights, not the headlights, per se. You got to understand that your headlights branch out, the beam of your light on this particular vehicle, from the front of the vehicle stretching out, – I think was like 37 feet, and then it reaches out to about I think it was 150 some feet, constantly as you know, dims down. The width of that was about 47. You are asking me–

Q you missed my question completely. How far back would the officer have been able to see Mr. Campbell's car?

A The car or the headlights? Are you talking about the car?

Q The car.

A Okay, for him to see the car, Mr. Campbell's car probably would have to be at least 8 feet, – I mean 8 car lengths, to see the car.

Q Okay, to see where a headlight crosses the center line, how far back would it be approximately?

A On that curve right there?

Q Yes, sir.

A Again 8.

Q Okay, you identified the car as approximately 16 feet?

A Correct.

Q So, we are talking 120 feet?

A Correct.

Q Or a little over half– you are saying around this bend, per this scale, if DX21 is accurate, you could only see a car a half inch back, anywheres around this, is that correct?

A The car?

Q Right.

A Yes.

Q If you were more than a half of an inch up, anywheres around here, you wouldn't be able to tell if he was crossing the center line? Is that your testimony?

A Not at night, you can't.

Q Is that a yes?

A Yes.

MR. MILLER: I have no other questions.

THE COURT: Anything further?

MR. LYZOHUB: No, you Honor.

THE COURT: You may step down.

(At about 2:21 P.M. witness excused)

THE COURT: Any further witnesses?

MR. LYZOHUB: Yes, you Honor, I call my client to the stand.

THE COURT: Are we going to be using the video any more?

MR. LYZOHUB: No.

THE COURT: We can move that out of the way.

THE COURT: Is that a yes or no?

MR. LYZOHUB: I am not going to be using it any more.

MR. MILLER: I don't foresee using it, your Honor.

THE COURT: Okay, we will disconnect it.

CHRISTOPHER JOHN CAMPBELL
Called by the defense, at about 2:22 P.M., sworn by the court officer, testified:

DIRECT EXAMINATION

BY MR. LYZOHUB:

Q Please state you name for the record?

A Christopher John Campbell.

Q Your address, sir?

A 15331 Lakeside, Plymouth.

Q Your age, sir?

A 48.

Q Were you operating a motor vehicle on September 15,

1996, at approximately 3:50 A.M., on Hines Drive, westbound from Haggerty Road, Plymouth Township, Michigan?

A Yes.

Q How was the weather that night?

A Clear.

Q How was your vision, sir?

A Vision, fine.

Q Do you need glasses for driving?

A No.

Q Do you need glasses for any other reason?

A Reading.

Q How were you dressed that evening?

A Shorts and tee shirt.

Q Were you wearing any shoes?

A No.

Q What was the purpose of your trip?

A Uh, well I had gotten in a fight with my wife and I was going to a hotel. When I got there, I realized that

I have forgotten my wallet, didn't have any I.D., credit cards or anything, so I was on my way back home.

Q And, what were the light conditions on Hines Drive that evening?

A With the exception of the intersections of Haggerty and Wilcox, and Northville Road, pretty dark.

Q Do you know how many curves are on Hines Drive?

A Four major curves, three what I would call, small curves. Seven in total.

Q And, could you go up to the aerial map that has been introduced into evidence as DX20, and show the Court your route of travel that evening?

A Sure. (INDICATING)

I was coming from Ann Arbor Road, so I was northbound on Haggerty, turned left westbound on Edward Hines, and of course, it curves all around, so I didn't stay westbound. It curves around even comes back east, and it curves in various directions. It curves around here. I made a right hand turn on Northville Road.

Q Do you recall where you were pulled over?

A Sure.

Q By Officer Bianchi?

A About there. (INDICATING)

Q When was the first time you noticed the emergency lights on Officer Bianchi' vehicle?

A On the map?

Q In reference to the map, correct.

A Probably right about, – just past Clements. (INDICATING)

Q Did you notice any other vehicle on Hines Drive, between Haggerty and Wilcox?

A No.

THE COURT: You are going to have to speak up. You don't have to get close to the mike, just speak up, if you are going to stay there.

THE WITNESS: There were no other vehicles.

MR. LYZOHUB: You can have a seat, sir.

BY MR. LYZOHUB:

Q The question was, did you notice any other vehicle on Hines Drive, between Haggerty and Wilcox, that evening?

A No.

Q Did you pass any vehicles?

A No.

Q Did any vehicle allow you to pass them?

A No.

Q Now, these photographs of Car 54, that have been admitted into evidence as DX4, DX5 and DX6. Is that similar in appearance to the vehicle that Officer Bianchi was driving?

A Yes.

Q Do you know how much distance was travelled on Hines Drive, once you got onto it from Haggerty Road to the point where you were stopped?

A I do no, 1.9 miles.

Q How do you know that?

A I measured it.

Q What happened when– how was your driving that evening?

A My driving was fine.

Q Did you speed?

A No.

Q Did you cross the center line?

A No.

Q What happened when you saw Officer Bianchi' emergency lights?

A I pulled over.

Q And, what happened next?

A Officer Bianchi came up to the car, asked for my license and registration. I told him that I didn't have it. Told him why I didn't have it, because I got into a fight, and went to a hotel, and realized that I didn't have my wallet, so, I was on my way home. He asked me if I had been drinking that night. I said, "yes." He asked me to step out of the car.

Q Where did you go when he asked you to step out of the vehicle?

A Around back of my car.

Q Now, there is some photographs here DX24, is that the general area where the traffic stop was effected?

A Yes.

Q Now–

A I recognize it by the south entrance of the Hilton.

Q Now, what has been admitted into evidence as DX22,

was that the condition of the gravel, where you were asked to perform the field sobriety tests, sir?

A Yes.

MR. LYZOHUB: Your Honor, for the life of me, I don't remember whether 22 was admitted or not? I move for it's admission if it was not.

THE COURT: I don't believe it was.

COURT REPORTER: Yes, DX22 and DX24 were admitted.

THE COURT: It was admitted, Okay.

BY MR. LYZOHUB:

Q And, you were barefoot?

A Yes.

Q Did the police officer, Bianchi, advise you of any miranda before any questioning?

A No.

Q Did he ask you to do any field sobriety tests?

A Yes.

Q What field sobriety test did he perform?

A We did the alphabet test, and the leg–

Q How did you perform that test?

A I am sorry.

Q How did you perform that test?

A I thought I did well.

Q Any other tests?

A Leg lift.

Q Did you pass the leg lift test?

A No.

Q And, why didn't you pass the leg lift test?

A Well, it was difficult. I was in my bare feet.

Q Is the surface of the shoulder, where the gravel is, a perfectly level surface?

A No.

Q This is the type of grave, that you were standing on?

A Yes.

Q Does the DX24 demonstrate the crown on the road, so to speak?

A Yes, there is a slight crown.

Q Did Officer Bianchi demonstrate the one leg stand before you performed that test?

A No.

Q Any other tests roadside?

A No.

Q What happened next?

A He put me in the back of the car, and asked me about my car, and I asked him to park it, in the lot underneath the lights, the Hilton. He did so.

Q Did police officer Bianchi advise you of any rights for breath testing on the roadside?

A No.

Q Did he administer a preliminary breath test?

A No.

Q Are you a smoker, sir?

A Yes.

Q How long have you been a smoker?

A Many, many years.

Q I am sorry.

A Many, many years.

Q More than 10 years?

A Oh, way more, maybe 25 or 30 years.

Q How much on an average, do you smoke a day?

A Couple packs.

Q Were you smoking a cigarette before you were pulled over that day?

A Yeah.

Q How soon were you smoking, before you got pulled over?

A I was smoking as I got pulled over.

Q When the police officer previously testified that you smelled of intoxicants, do you believe that to be true?

A I don't think so, because I just put a cigarette out.

I would think my car would be full of smoke.

Q Anything else happen after you were in the back of the patrol vehicle, and after your car had been moved by Officer Bianchi?

A There was another patrol car that came by, and stopped for a couple of seconds. They just– Officer Bianchi took me into the station.

Q Were you cooperative, sir?

A Yeah.

Q Have you done or had done, anything to the car which would affect the headlights?

A No.

Q Are they aimed the same now, as they were the night in question?

A Sure.

Q Can you tell us whether or not you used the high or low beam that evening?

A Low beam.

Q One moment, your Hnor.

MR. LYZOHUB: No further questions of this witness.

THE COURT: Mr. Miller?

MR. MILLER: I have no cross of this witness.

THE COURT: You can step down, sir.
(At about 2:30 P.M. witness excused)

THE COURT: Any other witnesses?

MR. LYZOHUB: I have an exhibit, your Honor, that is taken from the public records of the City of Plymouth, that I put together to demonstrate where the boundary lines are between Plymouth Township and the City of Plymouth.

(At about 2:31 P.M. DX26 marked by reporter)

MR. LYZOHUB: Now, the exhibit is good for purposes of demonstrating where the boundary lines are, not good for demonstrating the exact curves in the road and so forth.

They are certified copies, I have ones that I have obtained from the Building Department.

THE COURT: Have you seen those, Mr. Miller?

MR. LYZOHUB: I believe that I have showed him–

MR. MILLER: I have, and I will stipulate to the admission of the exhibit, as to where the boundary lines are.

THE COURT: All right, bring it up here. It will be admitted.

(At about 2:32 P.M. DX26 will be admitted)

MR. LYZOHUB: This just demonstrates very clearly that there are major portions of Hines Drive that are not within the–

THE COURT: You don't have that high-lighted, do you, and probably don't want to touch that beautiful document.

MR. LYZOHUB: We can highlight it, your Honor.

THE COURT: Okay, fine.

MR. MILLER: Your Honor, it may be easier to describe,-- we are trying to find a space for this exhibit.

THE COURT: You can put it in front of that one, for now at least.

MR. MILLER: Apparently, if I understand it, the border line,-- please correct me if I mischaracterize this. With the exception of Plymouth Road to the exit of Gunsolly, the entire distance from just before the entrance to Woods Drive to Wilcox Drive, of Edward Hines Drive, is in the City of Plymouth.

Is that a fair characterization?

MR. LYZOHUB: That appears to be correct.

MR. MILLER: Okay, this being Woods Drive, from here all the way to Wilcox, with the–

THE COURT: So, just before Woods Drive, is that what you are saying?

MR. MILLER: Correct.

THE COURT: All the way—

MR. MILLER: With the exception of Plymouth Road, approximately to- the exit of Gonsolly.

THE COURT: All right.

Just to clear thatup, that was admitted and is admitted.

Anything further from the defense?

MR. LYZOHUB: Not at this time, your Honor.

THE COURT: You rest?

MR. LYZOHUB: Yes, your Honor.

THE COURT: Any rebuttal?

MR. MILLER: None, you Honor.

THE COURT: Arguments?

MR. LYZOHUB: It is my motion, so I presume that I go first.

THE COURT: Right, you do, go ahead.

MR. LYZOHUB: The evidence demonstrates, your Honor, that this case should be dismissed

and/or the exclusion rule precludes use of the evidence. Conditions claimed by police officer, to be able to observe the Defendant in Hines Drive from behind, drive erratically, do not exist. There are to many curves, lighting does not allow a view, the distances are to great, the police officer's vehicle is to readily observable, if the vehicle was, as stated, on the road.

In other words, your Honor, it does not seem plausible that someone driving on Hines Drive would come upon a vehicle, police car in front of him, and try to tailgate him for two miles. It just is not a smart thing to do, it just is not believable, it is not credible.

We have the officer's own testimony which indicates that the Defendant's vehicle was no closer than 60 yards to his vehicle. That is approximately 180 feet, and I believe that is about 12 car lengths. What is significant to this Court, and I am going to cut through a lot of the evidence here, is we have a video tape of four to eight car lengths, which shows that the lights come in, and out, but then when we go to the video tape, which shows the 12 car lengths, you see the lights momentarily and then they are not there.

So, based on the officer's own testimony, it would be improbable, — physically improbable to have seen the vehicle of the Defendant that evening.

Moreover, what makes the police officer's version improbable, is that he had an obligation from the City, to take immediate action when he would see

A) improper activity on the road.

In this case, the officer testified that obviously for two miles, this activity occurred. Quite clearly if the officer had a car travelling at a high rate of speed, crossing the center line repeatedly, he should have taken immediate action, he should have pulled over to the side of the road and should have effected a traffic stop at that point.

To allow the Defendant to continue to operate the way described by the officer, just don't make any sense. I think, your Honor, in truth, what probably happened is that Officer Bianchi saw the Defendant much later, didn't see him initially as he claims, and/or if he did see the Defendant, he didn't really see him that clearly. He saw a Mercedes on the road, and I think he just elected to make a traffic stop.

Now, as to speeding, this Court should take judicial notice, pursuant to the Boyson v Hurst, 347 Mich 302, it is a 1956 case, that it is a matter of common knowledge that in the absence of daylight, while the street lights are on, an accurate determination as to the speed at which a motor vehicle is approaching, is difficult, if not impossible. Not only did the officer testify about things he saw in his rearview mirror, we are talking about events that occurred in the middle of the night. I would re-motion my request to this Court, to– if necessary, to go on Hines Drive to duplicate these conditions to see what actually happened.

We are not afraid of doing this, your Honor, because we believe that if the Court does go out there, it will see for itself that there was no reasonable cause within which to effect a traffic stop in this matter.

Now, the reasonable cause to administer a preliminary breath test, did not exist, your Honor. My client testified that

he passed his ABC's, and the officer acknowledged that ABC's has nothing to do with operating a motor vehicle.

The officer said that my client could not perform the one leg stand, but my evidence from the National Highway Traffic and Safety Administration, you are allowed an opportunity to drop your foot at least twice, in the thirty seconds, to do the leg stand, and more importantly, your Honor, the demonstrative evidence shows that there was gravel on the road, slight grade on the road, and as the officer himself has testified, my client was barefoot. I think it would be hard pressed for anybody to be barefoot on a gravel road, and for somebody to do a one leg stand.

My client testified that the numbers test was not administered, and notwithstanding the numbers test, these tests did not deal with the ability for my client to operate a vehicle in any way.

No miranda or breathalyzer warnings were given to my client, I believe that was significant.

Now, the Court's focus is on whether or not probable cause exists to arrest the Defendant. I respectfully suggest to the Court, that it does not.

The police officer claims to have administered a preliminary breath test. My client's version is that that never happened. But, assuming, you Honor, arguendo, that it did, the police officer violated the law by failing to observe the Defendant continuoulsy for 15 minutes, before administering the test. I am referring to—

THE COURT: You had not brought that up as an issue?

MR. LYZOHUB: Yes, I did, your Honor. The officer testified –

THE COURT: 15 minutes at the station you mean, you never got into that?

MR. LYZOHUB: No, at the road.

THE COURT: That is what the Rule applies to.

MR. LYZOHUB: The Rule applies to the preliminary breath test, and I have the Administrative Rules here. I refer to Administrative Rule 325.26, 55 (2)(b) –

THE COURT: Okay, read that.

MR. LYZOHUB: It states: "A person may be administered a breath test on a preliminary breath alcohol test instrument, only after it has been determined that the person has not smoked, regurgitated, or placed anything in his or her mouth, for at least 15 minutes."

Without question, the officer testified, under penalty of perjury that he pulled the Defendant over, or he observed the Defendant at Hines Drive and Wilcox, which would be here (INDICIATING) at 3:55.

Now, obviously it took some time to follow him, until the traffic stop was effected. Let's say it takes 45 seconds or a minute. Then from that point, we know that the dispatch logs show that he transported the Defendant at 4:05 back to the station.

It is obvious that my client had been smoking as he testified to, therefore, he did have something in his mouth, and the 15 minutes wasn't passed, and the preliminary breath test is not satisfactory.

Moreover, your Honor, police officer Bianchi did not testify that he was certified for the administration of the preliminary breath test, and therefore, since the burden of proof is on the People; to establish that the PBT was taken properly, that was not followed.

Your Honor, one of my points in my Brief was that the traffic stop was effected upon the Defendant as a mere pretext, and unconstitutional, and I know the Court made a ruling previously that – it did not feel that it was proper for the officer to produce those tickets from June 1, 1996 to present, but I would re-new my reqeust and under In Re Bay County Prosecutor (sp) ---

THE COURT: I was under the impression that you had been given those tickets? Isn't that correct?

MR. MILLER: Your Honor, it is my understanding that he has gotten everything that he has requested, and we have heard no objections prior to this time, even though he had been provided that information since November 7th.

MR. LYZOHUB: This is how it happened, your Honor. I gave a subpoena - - I gave two supboenas. One to the police department and one to Mr. Miller. Mr. Miller undertook the responsibility of complying with my subpoena request, working with the police

department. In order to prevent - or preclude any authenticity issues, I re-ssued the subpoena for Officer Bianchi to appear, and I added those provisions on the pretext issue, for the officer to produce those tickets.

THE COURT: Were you given those by the attorney for the City?

MR. LYZOHUB: No.

THE COURT: That is the question. Whether you got them from Officer Bianchi or not is not really relevant—

MR. LYZOHUB: I subpoenaed them for today's hearing.

THE COURT: He says you did, so we should know that.

MR. MILLER: Your Honor, anything that was requested, with those exceptions to policies, I have–

THE COURT: Those tickets, that is what we are talking about.

MR. MILLER: He has got every ticket that he requested.

MR. LYZOHUB: I beg to differ, you Honor.

THE COURT: Somebody ought to know, shouldn't they.

MR. LYZOHUB: Well, I got the subpoena here.

THE COURT: I know you got the subpoena. Do you have the materials that were given to you?

MR. LYZOHUB: I don't have those tickets issued from June 1, 1996 to present.

MR. MILLER: Can I ask which tickets you propose were issued, that you don't have?

MR. LYZOHUB: "All tickets issued by police officer Bianchi for any moving related violations, including misdemeanor offenses, in which the alleged traffic violater was observed by Officer Bianchi, to travel upon Hines Drive, for the period of time from June 1, 1996, to present."

MR. MILLER: Correct.

MR. LYZOHUB: I never got that. Unless that is the only ticket that he issued?

MR. MILLER: You got it.

THE COURT: Okay, there we are.

MR. LYZOHUB: Well, I would like to get an affirmation from the officer.

Is that the only ticket that you have ever issued on Hines Drive, from June 1, 1996–

COURT OFFICER: He is still under oath.

MR. LYZOHUB: From June 1, 1996 through present?

OFFICER BIANCHI: I don't recall any other tickets, that I have issued on Hines Drive, since June 1st. Since I have been in the City of Plymouth here, 7 ½ years, I have probably written three tickets to vehicles travelling on Hines Drive. It is not a road that we normally patrol. It falls under the– it belongs to Wayne County.

THE COURT: So, that is not an issue apparently?

MR. LYZOHUB: Apparently, it is not, your Honor, if I discover it later, I would raise it to the Court.

THE COURT: You certainly have a right to do that.

MR. LYZOHUB: Therefore, your Honor, I base that the evidence clearly demonstrates that reasonable cause to effect a traffic stop did not exist. Reasonable cause to request a preliminary breath test did not exist and probable cause to effect an arrest of the Defendant, did not exist as well.

Consequently, pursuant to the exclusionary rule, I ask

that this matter be dismissed.

THE COURT: Fine, thank you very much. Mr. Miller?

MR. MILLER: Your Honor, the argument that it is not reasonable to assume that a person would come up behind a police– a fully marked police vehicle, on Hines Drive, – it at least is reasonable to observe that that would happen, as it would be to argue against the preliminary breath test, that the Defendant said never took place.

Perhap's one person's view of what happened that night, may have been somewhat obscured or clouded, and because of that, they forgot the preliminary breath tests that were given at all, or for that matter whether or not they saw a vehicle or a police vehicle or something.

Officer Bianchi's testimony was clear, he observed in both the rearview mirror and the side view mirror, the Defendant's vehicle crossing the center line, a total of four or five times, sometimes of which he was certain were while in the City of Plymouth.

The only credibility that I would give to video tapes whatsoever, is that they show that the only passing zone for westbound Hines Park, in that section, is the short section that is in Plymouth Township. Therefore, there is no justifiable reason for the Defendant to cross that center line.

Officer Bianchi indicated that the Defendant had failed all his field sobriety tests, some of which the Defendant didn't remember– or didn't recall taking. There was no

testimony that the Defendant ever complained of the road surfact or the road levelness, or anything where he was taking these field sobriety tests. He never requested that he go to another surface because the gravel was difficult on his bare feet or anything.

The testimony of the officer again, was very clear. I think the testimony of the investigator is greatly suspect when– as I understand it, they are arguing– again what I am going to characterize as Woods Drive turn on Hines Park, on the large map, – that if the vehicle was an half inch behind you, you couldn't see the vehicle's headlights.

I think the Judge can look and see, and you know that curve, that turn, you can see around it a lot further, than half inch on this map.

The officer's testimony was clear, unequivocable. We would ask that the motion be dismissed.

THE COURT: Anything further?

MR. LYZOHUB: Your Honor, I would reiterate my request to this Court, to actually travel Hines Drive. There is a great factual dispute. The allegations that if you looked at him one half inch behind– I think just does not give a flavor to the Court, of actually what happened, that evening.

I think that if the Court would actually visit the scene, and to observe it, you would come to the firm conclusion, that there was no reasonable cause necessary to effect the traffic stop in this case.

THE COURT: Thank you. Just going quickly to the issue of whether or not I visit the scene, this Court has driven that, – having lived in the area for 25 years, I wouldn't have any idea how many days I have travelled on that road, – but, it would probably be into the hundreds of times that I have travelled that road. I have not travelled it, I don't believe, except one or two occasions, at 3:55 at night, but the Court will not be visiting the scene.

I want to compliment both of you on your presentations. This is a Motion to Dismiss for Failure of People to Establish the Requisite Reasonable Cause to Effect a Traffic Stop. The facts don't seem to be in dispute, so far as on September 15, 1996, at approximately 3:55 A.M., at least according to the officer's clock, in his car, as opposed to the clock at the station, which many times is a little bit different that the police officer, Ronald Bianchi, was travelling westbount on Hines Drive, west of Woods Drive, in the City of Plymouth, when he observed a vehicle driven by the Defendant, Mr. Campbell.

He first saw him at some distance. There is some dispute as to what the distance is, but really that is a question of fact for a trier of the fact, if you will, further down the line if there happens to be a jury or bench trial in this case, although I did look at that, and I think that is a disputed issue at this point. I have to look at it in a light most favorable to the prosecution, at this point.

When he first observed this vehicle, it was behind him. It approached him,-- he classified a high rate of speed, and at least four times crossed the center line of the road. It would seem to me that it might be easier to see a car, with it's headlights on at night, then during the daytime, on these

curves.

Why an individual comes up close behind the police car, is beyond my comprehension. Perhap's he didn't realize that it was a police car, and came up behind it. Having been here for almost 12 years, I have heard people run into police cars, and cut off police cars and so forth. So, I have no explanation for that.

But, just before the officer approached Wilcox Road, he slowed and pulled off into the shoulder to let this vehicle go by, which he described as going at a high rate of speed. Again, whether it was a high rate of speed, is a question of fact, and not conclusive that he was not speeding.

Based upon those facts and that time of night, the only cars on the road at that point was the officer and the Defendant's car, and it is reasonable to believe that if he was treavelling at a high rate of speed, and he was crossing the center line, that there may be some indication that — alcohol had been involved, so, the officer had every right to stop the individual and find out whether or not he was drinking. When he approached the vehicle, he noticed a strong odor of intoxicants, and the Defendant in fact, himself apparently admitted to the officer at that time, and admitted here on the stand again, that he had been drinking, had a fight with his wife, and was going to a hotel, but realized after getting there, that he didn't have his wallet and so forth.

I might also add that he was driving barefoot, which may indicate something, I am not saying he should not have been driving barefoot, although I think you can argue about that too.

He was given the sobriety tests, according to the officer, he did fail the sobriety tests. That again, is a question of fact.

So, based on the officer's observation and experience, he had reasonable cause to make an investigatory stop of the Defendant, and when he found out the Defendant had been drinking, he had every right to have the sobriety tests administered. It will be up to the trier of fact, if you will, to determine whether or not he passed or failed those tests.

There are cases, particularly People v. Christy, 206 Mich App 304, that says:

> "Erratic driving in and of itself can give rise to a reasonable suspicion of unlawful intoxications, to justify the officer's stop."

The officer had a right to administer the PBT test, as far as this Court is concerned.

There was no complaint by the Defendant, that the sobriety tests were given to somebody who couldn't take the tests or anything of that nature. So, I say that is proper.

My decision then, is of course, that the officer did observe the Defendant drive erratically in the City of Plymouth, and incidentally there is a statute which I am sure most of you are familiar with, which is M.C.L.A. 117.34, which indicates:

"When any person has committed or is suspected of having committed any crime or misdemeanor within a City, – some of this does not apply to this case,-- or has escaped

from any City, the officers of the City shall have the same right to pursue, arrest and detain such person, without the city limits and so forth."

So, the fact that he is in and out of the City, or the Township, as far as I am concerned, does not prohibit him from stopping this individual.

As I indicated, he observed his driving, this gave him a reasonable cause to stop the Defendant. After he stopped him, he had reasonable cause to believe that he was intoxicated, particularly in light of the fact that he admitted that he had been drinking and that he also failed the field sobriety tests, and he had cause to administer the PBT, and arrest the Defendant for OUIL.

This motion is denied. That is it. Do you want me to set this up for a trial or jury trial?

MR. LYZOHUB: If I could make a request to the Court.

THE COURT: Sure.

MR. LYZOHUB: I am requesting that his Court certify this matter for an immediate appeal. We have waived the 77 Day Rule already. The Supreme Court administrative order to the Circuit Court, is that they must dispose of cases within 5 months, so it will not be an undue–

THE COURT: Well, I will not do that. I will not stay the continuation of this. We will set up a jury trial, if that is what you want. You do what you want to do, as far as Circuit Court is concerned. I don't have a

problem with that.

My policy is that I do not stay, the OUIL cases.

MR. MILLER: Thank you, your Honor.

THE COURT: We will give you a jury trial date, is that what you want?

MR. LYZOHUB: Probably another pre-trial.

THE COURT: We will give you a fairly quick pre-trial. That is Christmas, I am sorry, I will not do that to you.

MR. MILLER: The first one in the new year, would be fine with us, your Honor.

THE COURT: You will be here the 18th?

MR. MILLER: The 18th will be fine.

THE COURT: Why don't we have the 18th, even though that is not my docket date.

MR. LYZOHUB: Of next week, your Honor. I am in Redford, excuse me, I am in Livonia District Court that morning.

THE COURT: Well, you will be able ;to get over here.

MR. LYZOHUB: Ultimately not at 9:00.

THE COURT: Well, if we don't think we are going to resolve this, then I would just assume set the jury trial. I am giving you one more chance to discuss this with the City Attorney.

MR. LYZOHUB: I appreciate that, your Honor.

THE COURT: I am going to set it for the 18th. What do you have in Livonia?

MR. LYZOHUB: Pre-Trial, three charges.

THE COURT: You can come here first. He gets here at 8:30 in the morning.

MR. MILLER: I will be happy to take care of him.

THE COURT: We will know where you are going, okay.

So, we will set it for the 18th, the pre-trial. If we don't have any luck there, we will give you a jury trial date.

MR. MILLER: Thank you, your Honor.

THE COURT: Do you want to collect these exhibits. These exhibits normally stay , what do you

want to do about them?

MR. LYZOHUB: I can hang on to them.

THE COURT: Do you have any problem with that?

MR. MILLER: I have no objections of anybody in this courtroom, keeping the exhibits.

COURT REPORTER: Can the parties put on the record, that it will be the Defendant's responsibility to get the exhibits downtown, in case of appeal.

THE COURT: Right, she has just indicated to me, that if there is an appeal, you have to put on the record that you have taken these exhibits, and they are in your control.

What do you want to do now? Why don't we put on the record, that you will take the exhibits now, and they are in your control and so forth. Normally, we keep them here until the case is disposed of. But, because of the size, and so forth,-- we could find a place for them.

MR. MILLER: I have no objection to that.

COURT REPORTER: Do you agree to that?

MR. LYZOHUB: Yeah, I agree to that. I will deliver them, and take charge and do whatever is

necessary with the documents, required by court rule.

THE COURT: Thank you.

(At about 3:00 P.M. proceedings concluded)

Supreme Court, U.S.
FILED
JUN 23 1999
CLERK

98-1925

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER JOHN CAMPBELL,
Petitioner,

v.

PEOPLE OF THE CITY OF PLYMOUTH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

I. WHETHER PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED?

Respondent, The People of the City of Plymouth, answer "Yes".

Petitioner, Christopher John Campbell, answers "No".

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On September 15, 1996, at approximately 4 a.m., petitioner, Christopher John Campbell, was stopped by City of Plymouth Police Officer Ronald Bianchi who had observed petitioner's vehicle rapidly approaching from behind and driving left of center. Officer Bianchi observed petitioner's vehicle cross the center of the road four times. (Tr, 12/11/96, pp 8-10, 50). Police Officer Bianchi testified that he noted a strong odor of intoxicants on the petitioner, that his eyes were glassy and that he was barefoot. (Tr, 12/11/96, p 34). The petitioner admitted that he had been drinking. (Tr, 12/11/96, p 34).

Police Officer Bianchi conducted several field sobriety tests on the petitioner which he failed. When reciting the alphabet, petitioner began calling out letters at random after the letter "F". When counting from 75 to 93, the petitioner left out numbers and went to 100. When counting from 93 to 75, the petitioner left out several numbers and went past 75. The petitioner lost his balance within five seconds on each one leg balance test. (Tr, 12/11/96, pp 35-36). Police Officer Bianchi then read the petitioner his preliminary breath test (PBT) rights and administered a PBT. Following that, Officer Bianchi placed the petitioner under arrest for operating under the influence of intoxicating liquor (OUIL). (Tr, 12/11/96, p 37).[1]

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[1] Consistent with the foregoing testimony, Officer Bianchi testified that he did not arrest the defendant immediately upon stopping him. (Tr, 12/11/96, p 41). He arrested him after he had administered the PBT. (Tr, 12/11/96, p 44).

On October 23, 1996, petitioner filed his Motion to Dismiss for Failure of the People to Establish the Requisite Reasonable Cause to Effect a Traffic Stop and Otherwise. In that motion, the petitioner argued that reasonable cause did not exist to effect the traffic stop and that probable cause did not exist to arrest him. Pursuant to the petitioner's request, an evidentiary hearing was conducted in the district court on December 11, 1996, before Judge John E. MacDonald. Following the presentation of evidence, defense counsel argued that Police Officer Bianchi's testimony concerning his observation of the petitioner's vehicle crossing the center line four times (which was a basis for the traffic stop) was not "plausible", "believable", "credible", and was "physically improbable". (Tr, 12/11/96, pp 110-111). Based on those contentions, defense counsel argued that ". . . there was no reasonable cause within which to effect a traffic stop in this matter." (Tr, 12/11/96, p 112). Defense counsel also argued that reasonable cause to administer the PBT did not exist. (Tr, 12/11/96, p 113). Lastly, defense counsel argued that probable cause did not exist to arrest the petitioner. (Tr, 12/11/96, p 113). *See also* Tr, 12/11/96, p 119. For those reasons, defense counsel requested that the matter be dismissed. (Tr, 12/11/96, p 119).

In opposition to the motion, the prosecutor argued that Officer Bianchi's testimony concerning observing the petitioner's vehicle crossing the center line four or five times was clear. (Tr, 12/11/96, p 120). He noted that Officer Bianchi had testified that the petitioner had failed all of the field sobriety tests. The prosecutor requested that the motion to dismiss be denied.

Following the arguments of counsel, Judge MacDonald issued his decision from the bench. Judge

MacDonald noted the following facts.[2] The first relevant fact was that Officer Bianchi had observed the petitioner's vehicle cross the center line of the road at least four times. (Tr, 12/11/96, p 123). Based upon that fact, and the time of night, Judge MacDonald concluded that it was reasonable for Officer Bianchi to believe that alcohol was involved and, therefore, ". . . the Officer had every right to stop the individual and find out whether or not he was drinking." (Tr, 12/11/96, p 124).

Judge MacDonald then noted other relevant facts which were that when Officer Bianchi approached the vehicle, he noticed a strong order of intoxicants and the petitioner admitted to the Officer that he had been drinking. (Tr, 12/11/96, p 124). Judge MacDonald also noted that the petitioner had failed the field sobriety tests. Judge MacDonald concluded that ". . . based on the Officer's observation and experience, he had reasonable cause to make an investigatory stop of the petitioner, and when he found out the Petitioner had been drinking, he had every right to have the sobriety tests administered." (Tr, 12/11/96, pp 124-125). Judge MacDonald concluded that the Officer had a right to administer the PBT test. (Tr, 12/11/96, p 125). He ultimately concluded:

> "He observed his driving, this gave him a reasonable cause to stop the Defendant. After he stopped him, he had reasonable cause to believe that he was intoxicated, particularly in light of the fact that he admitted that he had

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[2] Judge MacDonald indicated that there was a question of fact as to the distance at which Officer Bianchi first observed the defendant. With respect to that disputed fact, he stated that he would have to look at it in a light most favorable to the prosecution. (Tr, 12/11/96, pp 122-123).

> been drinking and that he also failed the field sobriety tests, and he had cause to administer the PBT, and arrest the Defendant for OUIL."

(Tr, 12/11/96, p 126).

Subsequently, the petitioner filed an application for leave to appeal to the circuit court. On February 14, 1997, the circuit court entered its order granting leave to appeal. Two days earlier, on February 12, 1997, the petitioner had plead no contest to the charge of unlawful blood alcohol level with a dismissal of the operating under the influence of intoxicating liquor charge. The petitioner was sentenced on February 13, 1997, by the district court. On March 7, 1997, the circuit court entered its order staying the enforcement of the trial court's sentence pending the exhaustion of appeal rights except as to driver's license sanction.

Following briefing, oral arguments were held in the circuit court on March 26, 1997, before Wayne County Circuit Court Kathleen MacDonald. Judge MacDonald rejected the arguments of the petitioners stating:

> ". . . it is really a standard of reasonableness that is to be applied for both the stop and search of moving vehicles, *People v Wayland* at 390 Mich 672, 1986. Reasonableness is to be determined from the facts and circumstances of each case and fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved than if a house or a home were involved. A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop

and search is conducted by the police.

I find this case to be closer to *People v Christy* [sic] at 206 Mich App 304, 1994 case, where the Court found that the stop of the vehicle wasn't [un]reasonable; other than in that case the arresting officer – well, the arresting officer followed the Defendant for a short period in this time, too; observed the vehicle drift to the right and left; and the Court stated that the officer had – the erratic driving gave rise to a reasonable suspicion of unlawful intoxicants so as to justify the stop by the police officer.

The police officer here stated that he, at approximately four a.m. he was traveling westbound on Hines Drive from Haggerty in a fully marked patrol car when he saw a set of headlights in the rear view mirror. He testified he believed he was traveling 35 to 40 miles an hour and the headlights were closing in on him quickly. He testified the vehicle approached him from behind, was driving left of the center line, although not completely over the center line and varying over the yellow line.

The officer stated that he saw the vehicle from his rear view and side view mirrors and observed the vehicle drive left of center four or five times. He also testified that he pulled over to the side of the road to allow the vehicle to pass him; that the vehicle passed him and accelerated quickly; that the officer stated it

took him half way through the bend to catch up with the vehicle. He testified that he has made over 500 arrests of individuals for drunk driving and he recognizes certain things which are indicative of people who are driving under the influence or impaired. He testified that he saw several of those indications in Mr. Campbell's driving that night.

The Court held that based on the officer's observation and his experience, the officer had reasonable cause to make the stop. The Court more specifically stated that the officer first saw the Defendant at a distance; that the Defendant was behind the officer. The Court noted that the Defendant approached the patrol car at a high rate of speed, at least four times crossed the center of the road. The Court further stated that it would be easier to see a car at night on the curves than during the day. The Court did not comprehend why an individual would come so close behind a police car but recognized that stranger things had happened. The Court reiterated the officer's testimony that the car was traveling at a high rate of speed and concluded, based on all of this, that it was reasonable to believe that he was traveling at a high rate of speed, and that he crossed the center line, and that there may have been some indication alcohol was involved so the police officer had every right to stop the individual and find out whether or not he was drinking. That's at 124.

I believe that there is certainly enough facts.

> I don't believe from the transcript that I read that the Court was ever abdicating a decision on the facts. He used the proper standard that when you view these facts, you view them in light most favorable to the non-moving party. That doesn't ever change the burden of proof here. The people still had to produce evidence sufficient to get - for the Court to make that finding.
>
> I think that he did not commit error and the Court's findings of fact, after reviewing the entire transcript and the remainder of the evidence were supported by the record and this Court is not left with a firm conviction that a mistake has been made. I think also that the Court, although you may believe that your expert was right and the police was wrong, the Court certainly made a credibility decision and found the officer's testimony to be more credible than your expert's, so his findings were not clearly erroneous; and lastly, I think there is an issue as to the sobriety tests and the Breathalyzer.
>
> I agree with the People on this one. It doesn't matter, I don't think, after the Defendant himself admits that he'd been drinking and after the stop. Therefore, for all those reasons, the lower Court's decision is upheld."

(Tr, 03/26/97, pp 20-23). The order affirming decision of the trial court on the issues raised by petitioner's appeal was entered on April 30, 1997.

On May 19, 1997, the petitioner filed an application for leave to appeal in the Michigan Court of Appeals. That application was assigned Docket No: 203372. Respondent filed an answer to the application on June 12, 1997. That application was dismissed by the Court of Appeals for failure to pursue the case in conformity with the court rules. The dismissal was without prejudice. On January 7, 1998, petitioner filed another application for leave to appeal in the Court of Appeals. That application was assigned Docket No: 208759. Respondent filed its brief in opposition on January 19, 1998. On June 18, 1998, the Court of Appeals entered its order in Docket No: 208759 denying the delayed application for leave to appeal for lack of merit in the grounds presented.

On July 8, 1998, petitioner filed his application for leave to appeal in the Michigan Supreme Court. That application was denied by the Michigan Supreme Court on February 25, 1999.

ARGUMENT

PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. Introduction

The reasons advanced by petitioner for granting the petition for writ of certiorari are such that coherent legal positions are somewhat difficult to pinpoint.

Petitioner seems to suggest that this Court should determine whether field sobriety tests are a seizure subject to the Forth Amendment scrutiny of reasonableness because, according to petitioner, the trial court in this case did not require the People to carry the burden of proof to establish the propriety of the field sobriety tests.

Well, the issue of whether the People were required to establish reasonable cause to administer the field sobriety tests was never raised below. In defendant's motion to dismiss for failure to establish the requisite reasonable cause to effect a traffic stop and otherwise, dated October 23, 1996, petitioner argued that reasonable cause was necessary to effect a traffic stop, that reasonable cause was necessary to request a preliminary breath test and that probable cause was necessary to effect an arrest. Motion to dismiss, ¶¶ 7(B), (D), and (E). Petitioner argued that the requisite reasonable cause for the traffic stop and the preliminary breath test was not established and that the requisite probable cause to arrest was not established. Petitioner never raised the issue of whether field sobriety tests are a seizure subject to the Forth Amendment scrutiny of reasonableness. Frankly, the requirement that the People establish reasonable cause was assumed.

In his subsequent briefs to the Michigan circuit court, Court of Appeals, and Supreme Court, petitioner raised three issues, to wit: (1) that reasonable cause did not arrest to affect the traffic stop, (2) that probable cause did not exist to arrest him and (3) that the trial court judge unconstitutionally shifted the burden of proof regarding reasonable cause and probable cause to the defendant. Those are the only issues preserved. None of them has any merit.

B. The Michigan district court, the circuit court, the Court of Appeals and Supreme Court properly determined that the traffic stop was reasonable under the Fourth Amendment because Officer Bianchi had reasonable cause to believe that a traffic violation had occurred.

In *Whren v United States,* 517 US 806, 116 S Ct 1769, 135 L Ed 2d 89 (1996), this Court held that a traffic stop is reasonable under the Fourth Amendment so long as the police officer had reasonable cause to believe that a traffic violation had occurred. 116 S Ct at 177. It is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity. *People v Christie (On Remand),* 206 Mich App 304, 308, 520 NW2d 647 (1994) citing *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). In order for law enforcement officers to make a constitutionally proper investigative stop, the totality of the circumstances must yield a particularized suspicion that the person stopped has been, is or is about to be engaged in criminal activity. *People v Shabaz,* 424 Mich 42, 59, 378 NW2d 451 (1985); *People v Nelson*, 443 Mich 626, 632, 505 NW2d 266 (1993).

When dealing with a vehicle, the reasonable and articulable suspicion must be directed at the vehicle. *People*

v Bordeau, 206 Mich App 89, 93, 520 NW2d 374 (1994). Fewer foundational facts are necessary to support a finding of reasonableness where a moving vehicle is involved. *People v Christie, supra,* at 308-309 citing *People v Whalen*, 390 Mich 672, 682, 213 NW2d 116 (1973).

The Michigan Court of Appeals has held that erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer. *People v Chinn*, 141 Mich App 92, 366 NW2d 83 (1985); *People v Christie, supra.*

Here, the traffic stop of the defendant was reasonable because Officer Bianchi had observed a traffic violation, defendant's vehicle crossing the center line four or five times, and Officer Bianchi had reasonable cause to suspect ongoing criminal activity, i.e., that the defendant may have been intoxicated. Defendant's vehicle approached the vehicle of Officer Bianchi from the rear and closed the gap between the two of them. Defendant's vehicle was seen crossing the center line four or five times. These are, to use the language of *People v Christie, supra,* ". . . classic indicia of an intoxicated driver." The investigatory stop was a "minimal intrusion" of defendant's Fourth Amendment rights in light of defendant's potential danger to the public. *People v Nelson, supra,* at 637. The same reasonable suspicion of unlawful intoxication which justified the stop of the petitioner also served to justify and warrant the administration by Officer Bianchi of the field sobriety tests to the petitioner (which he failed).

C. The district court, the circuit court, the Court of Appeals and the Supreme Court properly determined that Police Officer Bianchi had probable cause to arrest the defendant

Because the investigative stop itself was proper, Officer Bianchi was permitted to briefly detain the defendant and make reasonable inquiries aimed at confirming or dispelling his suspicions. *People v Nelson, supra*, at 637; *People v Weoman*, 218 Mich App 406, 411, 554 NW2d 577 (1996). During Officer Bianchi's inquiry, he received information from the defendant himself that he had been drinking. *Berkemer v McCarty*, 468 US 420; 104 S Ct 3138; 82 L Ed 2d 317 (1984) and *People v Chinn, supra*. The defendant then failed the field sobriety test. Defendant was then given a PBT. The foregoing circumstances and the information derived therefrom gave Officer Bianchi a reasonable suspicion that the defendant had been engaged in criminal activity, i.e., driving under the influence of intoxicants, and justified the arrest of the defendant without a warrant. MCLA 764.15(1)(C), MSA 28.874(1)(C).

D. The district court did not impose the burden of proof on the defendant. The circuit court, the Court of Appeals and the Supreme Court correctly agreed.

Petitioner asserts, but does not show, that the district court imposed the burden of proof on him to establish the putative illegality of the traffic stop and arrest. The argument has no merit. The district court did not impose the burden of proof on the petitioner.

The motion filed by the defendant which lead to the evidentiary hearing which he requested and ultimately to the ruling of the district court which he has challenged and continues to challenge was a Motion to Dismiss for Failure of the People to Establish the Requisite Reasonable Cause to Effect a Traffic Stop and Otherwise. Since the defendant moved to dismiss the charge against him, the district court

properly viewed the evidence at the evidentiary hearing in the light most favorable to the non-moving party. *People v Hampton,* 407 Mich 354; 285 NW2d 284 (1979); *People v Vail*, 393 Mich 460, 463; 227 NW2d 535 (1975); *People v Wright,* 99 Mich App 801, 818; 298 NW2d 857 (1980).

Respondent contends that the district court properly viewed the evidence in the light most favorable to the prosecution in making its determination that Officer Bianchi had reasonable cause to stop the defendant and probable cause to arrest him. The burden of proof was never shifted. It always remained on the prosecution. All that district court Judge MacDonald determined was that the prosecution had met its burden of establishing reasonable cause to stop and probable cause to arrest.

RELIEF REQUESTED

For the foregoing reasons, respondent, The People of the City of Plymouth, contend that petitioner's petition for writ of certiorari should be denied.

PLUNKETT & COONEY, P.C.

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DATED: June ____, 1999